REPORTS

OF

Cases Argued and Determined

IN THE

COURT of CLAIMS

OF THE

STATE OF ILLINOIS

VOLUME 49

Containing cases in which opinions were filed and
orders of dismissal entered, without opinion
for: Fiscal Year 1997—July 1, 1996-June 30, 1997

SPRINGFIELD, ILLINOIS
1998

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(PRT3022673—300—7/98)

PREFACE

The opinions of the Court of Claims reported herein are published by authority of the provisions of Section 18 of the Court of Claims Act, 705 ILCS 505/1 *et seq*., formerly Ill. Rev. Stat. 1991, ch. 37, par. 439.1 *et seq*.

The Court of Claims has exclusive jurisdiction to hear and determine the following matters: (a) all claims against the State of Illinois founded upon any law of the State, or upon any regulation thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for certain expenses in civil litigation, (b) all claims against the State founded upon any contract entered into with the State, (c) all claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the Governor stating that such pardon is issued on the grounds of innocence of the crime for which they were imprisoned, (d) all claims against the State in cases sounding in tort, (e) all claims for recoupment made by the State against any Claimant, (f) certain claims to compel replacement of a lost or destroyed State warrant, (g) certain claims based on torts by escaped inmates of State institutions, (h) certain representation and indemnification cases, (i) all claims pursuant to the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen & State Employees Compensation Act, (j) all claims pursuant to the Illinois National Guardsman's Compensation Act, and (k) all claims pursuant to the Crime Victims Compensation Act.

A large number of claims contained in this volume have not been reported in full due to quantity and general similarity of content. These claims have been listed according to the type of claim or disposition. The categories they fall within include: claims in which orders of awards or orders of dismissal were entered without opinions, claims based on lapsed appropriations, certain State employees' back salary claims, prisoners and inmates-missing property claims, claims in which orders and opinions of denial were entered without opinions, refund cases, medical vendor claims, Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen & State Employees Compensation Act claims and certain claims based on the Crime Victims Compensation Act. However, any claim which is of the nature of any of the above categories, but which also may have value as precedent, has been reported in full.

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Chief Justice - January 15, 1993—
Judge - February 26, 1987—January 15, 1993

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Marion, Illinois
March 26, 1985—January 17, 1997

ROBERT FREDERICK, Judge
Urbana, Illinois
June 1, 1992—

DAVID A. EPSTEIN, Judge
Chicago, Illinois
June 20, 1994—

FREDERICK J. HESS, Judge
Belleville, Illinois
January 21, 1997—

NORMA F. JANN, Judge
Chicago, Illinois
May 1, 1991—

RICHARD MITCHELL, Judge
Jacksonville, Illinois
February 24, 1993—

ANDREW M. RAUCCI, Judge
Chicago, Illinois
November 9, 1994—
February 28, 1984—June 1, 1992

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Secretary of State and
Ex Officio Clerk of the Court
January 14, 1991—

KATHERINE A. PARKER
Deputy Clerk and Director
Springfield, Illinois
March 1, 1995—

CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

REPORTED OPINIONS

FISCAL YEAR 1997

(July 1, 1996 through June 30, 1997)

(Nos. 83-CC-1892, 84-CC-0370 cons.—Claims denied.)

WILLIAM ROY HERSHEY, BARBARA M. HERSHEY, and PRAIRIE FARMS DAIRY, INC., Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1997.

BROWN, HAY & STEPHENS (EDWARD CUNNINGHAM and EMMET FAIRFIELD, of counsel), and LABARRE, YOUNG & DIETRICH (LAURA G. DIETRICH, of counsel), for Claimants.

JIM RYAN, Attorney General (MICHAEL WULF, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*driver's statutory duty to stop and yield at intersection indicated by stop sign.* Pursuant to section 11—904(b) of the Illinois Vehicle Code, the driver of a vehicle approaching an intersection indicated by a stop sign must stop at the marked stopline or, if none, before entering the crosswalk, but where there is no stopline or crosswalk, the driver must stop nearest the intersecting roadway where he or she has a view of approaching traffic, and after having stopped the driver shall yield the right-of-way to any vehicle which has entered, or is closely approaching, the intersection.

SAME—*automobile collision—State not negligent in placement of road sign—claims denied.* In claims brought by the injured driver of a vehicle and an insurance company alleging that the State's negligent placement of a road sign obscured the driver's view of crossing traffic at an intersection, the evidence showed that it was the driver's failure, after stopping at a stop sign, to

approach the intersection roadway to the point where he had an unobstructed view of traffic which caused the accident, and the claims were denied.

OPINION

SOMMER, C.J.

These claims are for damages suffered by the Hersheys due to an automobile collision allegedly caused by the State's negligent placement of a road sign, and Prairie Farms' insurer's claim for subrogation of insurance payments to third parties involved in the collision.

There is no question that Claimant William Hershey was seriously injured and incurred substantial medical expense and that Claimant Prairie Farms' insurer paid substantial amounts to third parties. In addition, the State has admitted that the height of the "Do Not Enter" sign in question was not in conformity with the Uniform Traffic Control Devices Manual.

The Claimants allege that, when Mr. Hershey's automobile stopped at the stop sign on Spaulding Orchard Road at the intersection of Route 4 in Sangamon County, a "Do Not Enter" sign blocked his vision of automobiles coming from his left on Route 4. The Claimants introduced photographs, a motion picture, and testimony to prove their contention that Mr. Hershey's view as blocked due to the "Do Not Enter" sign being low.

Mr. Hershey testified that he was familiar with the intersection, having gone through it many times, but did not notice the obstructing sign and that his view of Route 4 must have been obstructed when he stopped at the stop sign. Mr. Hershey's automobile came to a stop at the stop sign with the front wheels even with the sign. He saw no automobiles coming from his left on Route 4. He then went forward a couple of feet to a second stop with the

sign even with the driver's door. Mr. Hershey testified that he looked north (right) and south (left) before his automobile moved toward Route 4 from the second stop. He remembers a blur in front of him as he entered Route 4 just before the impact. He opines that the "Do Not Enter" sign was obscured by the light conditions as it was early morning and the color of the sign blended into the background, while a brown Boy Scout sign further down Route 4 blocked his vision of Route 4 beyond the blockage of vision caused by the "Do Not Enter" sign because it blended into the background.

The stop sign on Spaulding Orchard Road was 45 feet from the nearest traffic lane on Route 4 and the highway shoulder was ten feet wide. While the "Do Not Enter" sign and a Boy Scout sign 318 feet down Route 4 may have obstructed the view of Route 4 at some point approaching the intersection, the unobstructed view of Route 4 with the front bumper of an automobile at the shoulder, a point 10 feet from Route 4 and 35 feet beyond the stop sign, was at least 700 feet. The Respondent's witness, Mr. Gregg, testified this unobstructed view was available even when the front bumper was ten feet back from the shoulder.

Section 11—904(b) of the Illinois Vehicle Code states:

> (b) * * * every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk or the near side of the intersection, or if none, then at a point nearest the intersecting roadway where the driver has a view of approaching traffic or the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered the intersection from another roadway or which is approaching so closely on the roadway as to constitute an immediate hazard during the time when the driver is moving across or within the intersection * * *. 625 ILCS 5/11—904(b).

There was no stop line or crosswalk at the intersection in question in this claim. Mr. Hershey's argument is that his view of oncoming traffic to his left having been

blocked by the low "Do Not Enter" sign and the Boy Scout sign, he was not aware of any traffic coming from his left; therefore, he committed no negligence by proceeding into the intersection, and the State was negligent for blocking his vision by placing the "Do Not Enter" sign too low; and was the proximate cause of the collision.

The standard established by section 11—904(b) of the Vehicle Code is that where there is no stopline and no crosswalk, a driver must stop nearest the intersecting roadway at a point where the driver has a view of approaching traffic.

In this claim, at a point nearest the intersecting roadway with an automobile's front bumper at the shoulder, there was an unobstructed view of the roadway on the left of 700 feet. Indeed, there was testimony that the view was unobstructed when the front bumper was ten feet from the shoulder.

As there was no stopline or crosswalk at the stop sign, which was 45 feet from the traffic lanes of Route 4, the law required Mr. Hershey not only to stop at the stop sign but also to approach the intersecting roadway to a point where he had a view of oncoming traffic and then stop. To contend that a motorist's only obligation is to stop at stop signs 45 feet from the intersecting roadway, creep forward a few feet, and then accelerate and be held free from negligence or causation of a collision at the intersecting roadway is incorrect. Mr. Hershey would have had an unobstructed view as he approached the intersecting roadway; therefore, we find that he was negligent and the proximate cause of the collision.

The possible blockage of Mr. Hershey's view of Route 4 at the stop sign was not a proximate cause of the collision due to the above section of the Vehicle Code

which required Mr. Hershey to proceed from the stop sign to a point where he had an unobstructed view nearest the intersecting roadway and then stop. It is apparent from testimony that Mr. Hershey accelerated from approximately 35 feet from his second stop to the pavement of Route 4 and did not stop or avail himself of the unobstructed view as he approached the shoulder.

Though we understand that Mr. Hershey was badly injured and sympathize with all he has gone through, we find that the State is not liable for damages in this claim.

It is therefore ordered that these claims are denied.

(No. 84-CC-0611—Claimant awarded $18,657.55.)

R. W. DUNTEMAN COMPANY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed March 10, 1995.

Order filed December 5, 1995.

Order filed November 27, 1996.

JAMES A. REIMAN & ASSOCIATES, for Claimant.

JIM RYAN, Attorney General (RICHARD KRAKOWSKI, Assistant Attorney General, of counsel), for Respondent.

LAPSED APPROPRIATIONS—*award cannot be entered unless sufficient unexpended funds remain in relevant appropriation.* The Court of Claims cannot enter an award in a breach of contract claim unless sufficient funds remain unexpended in the appropriation made to fund the project.

CONTRACTS—*State liable to contractor for improperly assessed liquidated damages and mobilization costs—sufficient funds available—award granted.* After it was determined that sufficient funds were available, an award was entered on behalf of a contractor in the amount of the State's improperly assessed liquidated damages for delays in completing airport construction work, since a contractual provision specifically prohibited alterations in work without a written change order which was not timely forthcoming from the State, and the State was also liable for costs of moving

the contractor's equipment during the delay, but not for additional handling of materials which was precluded by the terms of the contract, or for the contractor's attorney's fees and costs.

OPINION

MITCHELL, J.

Claimant, R. W. Dunteman Company, hereinafter referred to as "Dunteman" filed a breach of contract action against the State of Illinois, Department of Transportation, hereinafter referred to as "IDOT," pursuant to section 8(b) of the Court of Claims Act. (705 ILCS 505/8(b).) Dunteman contends that IDOT breached its construction contract and Dunteman is seeking damages in the amount of $25,250 plus interest in accordance with the State Prompt Payment Act. 30 ILCS 540/1 *et seq*.

Facts

R. W. Dunteman Company is an earth moving and paving firm. On January 25, 1982, IDOT awarded Dunteman a construction contract to perform construction work at Du Page County Airport for the sum of $137,355. The contract described the work as follows:

"Construct, light and mark extension to the parallel taxiway to runway 10/28 and a single row auto parking area."

The contract required that IDOT authorize all change orders in writing as per the correspondence from IDOT to Dunteman dated January 25, 1982, which states in pertinent part as follows:

"NO WORK SHALL COMMENCE UNTIL THE NOTICE TO PROCEED HAS BEEN ISSUED BY THE DIVISION OF AERONAUTICS. Any work started before this issuance may become ineligible for payment under this contract."

On April 22, 1982, a preconstruction meeting was held. The memorandum of the preconstruction conference indicates that among others present at the conference were: Larry Frank, the construction engineer from

the Division of Aeronautics of IDOT; Steve Moulton, of Crawford, Murphy & Tilly, Inc. ("CMT"); the consulting engineers and agents for IDOT; Jeff Plapp, the resident engineer for CMT; and Allen Dunteman on behalf of Dunteman. The minutes of the preconstruction conference indicate "as per Mr. Frank, only the Division of Aeronautics can approve the contract changes."

Mr. Dunteman testified that based on his experience, change orders are required to increase or decrease the scope of work specified in the contract. He further testified that it was Dunteman's practice to act on change orders as soon as they were approved by IDOT and received by Dunteman.

On April 26, 1982, construction work began. On April 30, 1982, Dunteman discovered an inferior subsoil problem. Jeff Plapp, resident engineer, directed Dunteman to excavate 2,500 cubic yards of ground. This work took two working days. A disking process was done to attempt to dry the soil due to excessive rain in May 1982. This process took three weeks to complete. By the end of May 1982 the subgrade was fairly well constructed.

In late May, it became apparent that the soil was unacceptable for asphalt. This condition was brought to the attention of Plapp who stopped the project and said he needed to contact Larry Frank, the construction engineer from IDOT. On June 9, 1982, CMT wrote a letter to Dunteman stating that the work could not proceed until Larry Frank visited the job site. On June 11, 1982, Frank visited the job site and approved a method of repair which would change the terms of the contract.

Frank testified that on June 11, 1982, he orally advised Dunteman to proceed with the work without any signed change order documents.

On June 14, 1982, CMT wrote Dunteman a letter regarding the June 11, 1982 meeting. No change orders were executed at that time. The June 14, 1982 letter indicates that additional amounts of stone could be used to firm the subsoil. In the letter, CMT requested that Dunteman provide it with a price for the stone. The letter further noted items of work which had not been completed by the contractor.

On June 17, 1982, Dunteman wrote CMT a letter indicating the price of the stone. In addition, Dunteman stated, in pertinent part:

"If our 'agreed' unit price is acceptable to you and the Illinois Department of Transportation, please issue your written Change Authorization so that this work may proceed without delay."

On June 18, 1982, Moulton, the project engineer, responded to Claimant's letter with a Change Order No. 1 for signature. The letter noted Dunteman's concern over receiving written authorization to proceed with the work and also expressed disappointment at the lack of progress on the uncompleted items listed in CMT's letter of June 4, 1982, which were unrelated to the subgrade problem.

On June 19, 1982, Dunteman submitted to IDOT Change Order No. 1 which took into account the additional cost of $6,157.60 for the crushed stone. On June 23, 1982, Dunteman submitted Change Order No. 2 to be signed by IDOT. This change order added 60 calendar days to the project. Executed copies of Change Order Nos. 1 and 2 were not received by Dunteman for approximately one month, until July 23 or July 24, 1982. The project was shut down from approximately May 1, 1982, when the subsoil problems were discovered, until July 23 or 24, 1982, when Dunteman received IDOT's written change order. During this shutdown, Dunteman was charged 44 calendar days, which constitutes the $15,200 in liquidated damages charged Dunteman.

Larry Frank, the construction engineer for IDOT, testified that no change orders were executed by IDOT between June 23, 1982, and July 15, 1982.

The fully executed change orders indicate that Roger Barcus, Chief of the division of aeronautic of IDOT, did not sign off on them until July 16, 1982. Upon receipt of the change orders, Dunteman completed the work expeditiously.

Claimant further alleges that while they awaited IDOT's execution of change orders, Claimant incurred mobilization costs for moving the equipment off the project while the project was shut down. Claimant contends that the mobilization costs incurred total $3,657.55.

IDOT made a charge for a 38 calendar day delay totaling $15,200 in liquidated damages. Claimant seeks recovery of the $15,200 charged. In addition, Claimant seeks payment in the amount of $6,360 for additional handling of materials and $3,657.55 for mobilization costs incurred in moving the equipment off the project during the construction delay. Claimant seeks total damages in the amount of $25,250.

I. Whether IDOT properly charged claimant for liquidated damages for delays in completing work

The issue before the Court is whether IDOT properly charged Claimant with $15,200 in liquidated damages for a 38 day delay in project completion where IDOT failed to execute change orders for the completion of the work.

In late May 1982, the project was shut down pursuant to the order of Jeff Plapp, resident engineer. On June 11, 1982, IDOT's construction engineer visited the job site and orally approved a method of repair which would change the terms of the contract. However, the

change orders were not executed by IDOT until July 16, 1982.

Respondent contends that the verbal directions of the construction engineer on June 11, 1982, and the letters from IDOT to Claimant on June 11, 14, and 18, 1982 were sufficient directions to Claimant and that a written change order was not necessary for completion of the work.

We disagree. At the preconstruction conference on April 22, 1982, the IDOT's construction engineer warned Claimant that written change orders must be issued to effect a change. On January 25, 1982, IDOT issued a letter to Claimant which, in pertinent part, states as follows:

"NO WORK SHALL COMMENCE UNTIL THE NOTICE TO PROCEED HAS BEEN ISSUED BY THE DIVISION OF AERONAUTICS. ANY WORK STARTED BEFORE THIS ISSUANCE MAY BECOME INELIGIBLE FOR PAYMENT UNDER THIS CONTRACT."

Mr. Dunteman testified that in his experience and prior dealings with the State, work proceeded only when executed change orders were received. In addition, Claimant specifically requested a written change order on June 17, 1982, but IDOT failed to produce the document until July 23, 1982.

There is no question that the project was halted by the resident engineer. Respondent's contention that the oral instructions issued by IDOT's construction engineer on June 11, 1982 were sufficient to recommence construction is entirely unreasonable. First, the contract, the discussion at the preconstruction meeting, clearly dictate that proper procedure includes written change orders prior to commencement of work.

Claimant's reliance on IDOT's oral instructions on June 11, 1982, would have been entirely unreasonable in light of the foregoing. In addition, IDOT's letter of June 14, 1982, evidences the fact that the parties had not yet

reached an agreement as to terms in regard to costs or materials. If Claimant had relied on IDOT's oral instructions, their actions would have been contrary to the contract, the express mandates of IDOT, in addition to custom and practice.

Claimant's actions were entirely reasonable and justified under the circumstances. Respondent improperly charged Claimant with liquidated damages in the amount of $15,200.

II. Whether IDOT properly refused to pay for the additional handling of material

Claimant contends that due to additional work not originally contemplated in the contract, Claimant was forced to handle materials several times, therefore incurring additional expense of $6,360. Claimant seeks reimbursement for expenses incurred.

We disagree. Pursuant to special provisions to the contract identified as specification 152—3.2 and 152—4.1 and the testimony of Jeff Plapp, CMT resident engineer, and Steve Moulton, civil engineer, the contract specifically states that the contractor would be paid for the handling of materials only once. Pursuant to the terms of the specifications, the contractor would not be paid for handling the materials a second time. Jeff Plapp testified that he specifically advised Claimant's foreman to minimize his handling of the materials because if he handled them twice he would only be paid for handling them once. The conversation between the parties was evidenced by an entry in Plapp's diary of job site activities.

The Claimant's request for an award for additional expenses in the amount of $6,360 for additional handling of materials is without basis and appears to be specifically precluded by the terms of the contract.

Therefore, IDOT properly refused payment for additional handling of materials and an award to Claimant must be denied.

III. Whether IDOT properly refused to pay mobilization costs.

Due to the Respondent's delay in executing and issuing change orders, Claimant incurred "mobilization" costs for moving their equipment off the project. Mr. Dunteman testified that the costs were reasonable and necessary and totaled $3,657.55. IDOT's agent, civil engineer Steve Moulton, agreed that it is customary to charge for the movement of machinery where delays are not caused by the contractor. The Respondent did not address this issue in argument. In this case, the delay was caused solely by the inaction of the Respondent. It was entirely reasonable and customary for the contractor to move equipment not being used during the term of the delay. Neither the record nor argument advance any testimony or evidence that the costs incurred in moving the equipment were unreasonable.

An award for mobilization costs should be made in favor of Claimant in the amount of $3,657.55.

Conclusion

Claimant is denied an award for additional handling of materials.

However, an amount totaling $18,857.55, representing $15,200 for charges of improperly assessed liquidated damages and $3,657.55 for mobilization of equipment due to delays by Respondent, shall be granted.

Finally, as is often the case, the question of entering an award remains before the Court. This Court cannot enter an award unless sufficient funds remained unexpended

in the appropriation made to fund the project. (*Lowenburg/Fitch Partnership v. State* (1986), 38 Ill. Ct. Cl. 277; *Ude, Inc. v. State* (1982), 35 Ill. Ct. Cl. 384.) There is no evidence before the Court from which the Court can determine if appropriated funds remained from which to make an award. Therefore, before entering an award for the Claimant or making a recommendation to the General Assembly, we need additional information. Respondent is ordered to file the fiscal data on this project, including the balance of funds which lapsed at the conclusion of this project and a list of any other claims against that money so that the Court can determine what amount of award can be made, if any. Respondent shall file this information with the Clerk of Court within 21 days.

ORDER

MITCHELL, J.

This cause comes on to be heard following the Respondent's response to our opinion filed March 10, 1995, due notice having been given, and the Court being advised, finds:

In the March 10, 1995, opinion we found the Claimant suffered damages in the amount of $18,857.55 but did not enter the award due to the lack of fiscal information in the record. We then ordered the Respondent to provide that information within 21 days. The purpose for the deadline was to enable us to assess the information, enter another order, and present the matter to the General Assembly prior to its adjournment so that the Claimant would not have to wait an additional year to be paid.

On April 7, 1995, the Respondent requested a 30-day extension on the deadline. Had the Respondent complied with the order within that 30 days the Court would

still have had sufficient time to act on the matter. Instead, on May 5, 1995, the Respondent requested an additional 30 days. Respondent's information was not forthcoming within that period either and Claimant understandably felt the necessity to file a motion to compel. By the end of May the urgency became moot with the adjournment of the General Assembly.

To provide for payment of awards in claims of this nature the Court annually presents its decisions to the General Assembly for its consideration of appropriating funds. Proper and detailed fiscal information is needed to enable the Court to so advise the General Assembly, *e.g.* payment should be made from the appropriate source.

The information provided us in the Respondent's untimely response is utterly useless. The response states $2,073.02 in State services "B" bonds remain which had been appropriated and $18,642.76 in Du Page County airport authority funds exist. As for the bond money, no appropriation account code numbers were provided, no explanation of where the money is was provided, and nothing was provided to indicate whether the appropriation lapsed or was rolled over. As for the airport authority funds the Respondent did not inform us as to where that money is, how the fund operates, or even if it could be used to pay the award. In addition there was no breakdown as to how the contract was to have been funded percentage wise with respect to the two sources of money nor was there any indication of whether or not other claims to that money have been made.

Counsel for IDOT in a letter attached to the Respondent's response indicated he was "not exactly clear whether the court can order (IDOT) to expend the Du Page County Airport Authority Funds." That is not the question. IDOT has been assessed damages. No request

for reconsideration of the decision was filed. The decision is final. The question is whether IDOT can use the funds to pay the damages not whether the Court can order it.

If IDOT has access to either the bond money or the airport authority money and can expend it then it should do so as soon as is practical and report back to us. If IDOT cannot somehow manage to use the money to pay this claim we request that a more complete financial picture be presented sufficiently in advance of the next legislation session to enable us to present this claim.

ORDER

MITCHELL, J.

This cause coming on to be heard on the Claimant's motion for entry of an award. On March 10, 1995, the Court entered an order in favor of the Claimant, R. W. Dunteman Company, in the amount of $18,657.55. However, the Court noted that it could not enter an award unless sufficient funds remained unexpended in the appropriate made to fund the project. Based upon the information provided by the Respondent, the Court now believes there are sufficient funds in which to pay the amounts found due in the March 10, 1995 order. Therefore, the Court enters an award of $18,657.55 to the Claimant, R. W. Dunteman Company. Furthermore, the Court holds that the Claimant did not provide sufficient evidence to justify the awarding of attorney's fees and costs and the Court denies attorney's fees and costs to the Claimant.

IDOT will pay the award.

(No. 84-CC-2691—Claims denied; petition for rehearing denied.)

CLAIRE M. JACOBS and WILLIAM E. JACOBS, Claimants, *v.*
THE STATE OF ILLINOIS, Respondent.

Opinion filed August 28, 1996.

Order on petition for rehearing filed April 21, 1997.

THOMAS F. TOBIN, III, for Claimant.

JIM RYAN, Attorney General (DAVID S. RODRIGUEZ, Assistant Attorney General, of counsel), for Respondent.

HIGHWAYS—*State not insurer of conditions of highways—reasonable care*. The State is not an insurer of the conditions of the highways under its control, but it does have a duty to use reasonable care in maintaining its roadways.

SAME—*negligence—comparative fault*. To prevail in a highway defect case, the Claimant must prove that the State was negligent, that the negligence was the proximate cause of the injury, and that the State had actual or constructive notice of the defect in the roadway where the accident occurred, and although the Court will consider the comparative negligence of the Claimant in adopting an award, the Claimant's failure to establish the proximate cause of her injury precludes the State's liability, negating the need to compare fault.

SAME—*duty of driver of vehicle.* The driver of a vehicle has a duty to keep the vehicle under control and to drive at speeds reasonable and proper under the conditions that exist.

SAME—*highway defect—Claimant's negligence caused accident—personal injury and loss of consortium claims denied.* A claim brought by a woman seeking damages for personal injuries sustained when her car left a roadway, and a loss of consortium claim by her husband, were denied where, despite the Claimant's allegation that she hit a pothole which caused her car to leave the road, no such defect was found, the Claimant did not call the police to the scene and instead had her car towed, and testimony by the Claimant's own witness supported a finding that her negligence in driving off of the roadway and failing to slow down before attempting to return to the highway was the proximate cause of the accident.

OPINION

FREDERICK, J.

Claimant, Claire M. Jacobs, seeks damages of one hundred thousand dollars ($100,000) from Respondent for injuries Claimant alleges she received due to Respondent's

negligent maintenance of the southbound lane and shoulder of Barrington Road near the Barrington Tennis Club. Claimant, William E. Jacobs, presents a loss of consortium claim. The cause was tried before Commissioner Griffin.

Facts

Claimant, Claire M. Jacobs, testified that on April 5, 1982, at approximately 11:00 a.m., she was driving southbound on Barrington Road. It had just started to snow. She was traveling at 30 to 35 miles per hour. Claimant had just gone around a curve and was directly in front of what is now the Barrington Tennis Club when she hit something. She believes it was a pot hole. Her car veered to the right and she tried to steer to the left. The vehicle continued right, bounced around, and ended up in a field. She ended up some feet off the road. As the car left the roadway, Claimant was jerked around in the vehicle. When Claimant left her vehicle, she noticed that both tires on the right side of her vehicle were flat. Claimant walked back to the roadway and saw a big rut where her vehicle left the roadway. The hole was six to eight inches deep. Claimant identified photographs of the rut which were taken by her husband in June of 1982. The rut was not on the main part of the traveled highway. Claimant had her car towed and the tires and one rim repaired or replaced. She then made a police report so that the condition of the roadway would be reported and repaired. Claimant had never been in an accident before and had never had a blown tire before.

Claimant complained to the police about back pain but refused to have paramedics called. She advised the police she would see her own doctor and she went to her doctor's office. Claimant saw Dr. Lloyd McCarthy, an internist. She was examined by Dr. McCarthy who stated, "You hurt today. You're going to hurt worse tomorrow but you're okay." Dr. McCarthy was more concerned with a

gash on Claimant's knee than her back. Claimant was given medication for her knee and Roboxin and told to rest. Claimant testified that her back continued to get worse. She went to see Dr. Goldstein, an osteopath, for treatment. When the pain continued in her back, she went to see Dr. Lee, an orthopedic surgeon. Dr. Lee put her in traction and gave her a water treatment. She was in Sherman Hospital for three weeks. Claimant subsequently had a myelogram and evidently had two herniated disks. She then went to St. Mary's Hospital in Montreal, Canada. She saw Dr. Sutton who gave her chemonucleosis treatment. When Claimant returned from Canada, she had back spasms but the shooting pains down her legs were gone. She stayed in bed and her husband cared for her.

Claimant went back to work in September 1982, but just taught her classes. She received a handicapped sticker to park which she still has. She did not restart her private clinical practice until March of 1983. She had to rebuild her practice as a psychologist. She had to work with older children as she could no longer get down on the floor with the younger children she used to work with. At the time of the trial, Claimant continued to have back pain. She testified she has at least mild pain on a daily basis. She still had severe pain at least three days per week in 1995. She can no longer do many normal daily tasks and activities. Claimant has not shown dogs at shows since the accident as she cannot run her dogs around the ring.

Claimant had the following bills related to the accident:

Village Standard for towing & tires	$ 46
Travel Inc.	316
Northwest Community Hospital	15
Dr. Lloyd McCarthy	359
Northwest Community Hospital	34.50

Sherman Hospital	5,292.80
Dr. B.U. Chung	466
Elgin Orthopaedics	435
St. Mary's Hospital	3,312
Dr. John Sutton	1,400

Dr. John Sutton testified for Claimant by way of evidence deposition. Dr. Sutton is a board certified orthopaedic surgeon. Claimant, Claire M. Jacobs, became his patient in June of 1982. Claimant was suffering from left sciatica, which is pain radiating down the left leg. She had a herniated L4-5 disk. Dr. Lee had referred Claimant to Dr. Sutton. Dr. Lee had documented the herniated disk clinically and by tests. Claimant's history was that she had been in a motor vehicle accident and after the accident she incurred back pain which, over several days, began to radiate down her left leg. Dr. Sutton examined the Claimant and it was his impression that she suffered from an acute L4-5 disk protrusion. The disk was herniated outside its normal confines compressing the left C5 nerve root. Dr. Sutton treated Claimant with chemonucleosis. By using a drug, the pressure on a compressed nerve root is relieved. Dr. Sutton opined that Mrs. Jacobs' herniated disk is a permanent injury. Dr. Sutton also gave the opinion that he believes the car accident of April 1992, could have caused and in this case probably did cause her herniated disk.

Claimant, William Jacobs, is the husband of Claimant, Claire M. Jacobs. They were married in October 1948. Mr. Jacobs learned of his wife's accident on April 5, 1982. In June of 1982, he went out to the scene and took a picture of the roadway. He pointed out an eight-inch difference between the roadway and the shoulder. Mr. Jacobs confirmed his wife's treatment and condition.

Mr. Jacobs testified he has to do all of the household work and gardening that Mrs. Jacobs can no longer do.

He also testified their sexual activity has declined since the accident.

Robert L. Lippman, a civil engineer, testified as an expert on behalf of the Claimants. Mr. Lippman testified that a shoulder should be the same height as the roadway. When a shoulder drop-off becomes more than three inches, it should be fixed immediately. A drop-off of an inch to three inches is tolerable but not safe. Mr. Lippman also indicated that there was an accident at the same site on March 16, 1981. He further testified that an accident report is a tool you use to determine if a road needs more inspection and what caused the accident. He felt that an accident report flags one to go out and look at the location. The March 14, 1981, report indicated that the driver in that situation was southbound on Barrington Road when she hit the shoulder, lost control of the car, and rolled the car. On the police report, the shoulder is noted as low and soft. This police report from 1981 should have been fixed immediately, according to Mr. Lippman. Mr. Lippman opined that the drop-off was more than six inches. There were no repairs made.

It was Mr. Lippman's opinion that Claimant, Claire M. Jacobs, went on the shoulder with her two right tires, that she tried to get back on the road too fast. The differential was more than three inches. The scrubbing effect on the edge of the pavement caused her to lose the air in her tires and she lost control. The proper way for her to have gotten back on the highway would have been to slow down to a stop and then turn left. Mr. Lippman further testified that when people learn to drive they are told that if they get on the shoulder, to slow down, stop and get back on the roadway. This procedure is in the driver's manual. However, people who leave the road are surprised and human nature causes them to forget about what they learned and their reflex actions tell them to turn in "and that's

what causes all the accidents he has been listening to. That causes all the accidents that you have been hearing. The person is surprised, they forget what they learned, and they try to turn back on."

It was the opinion of Mr. Lippman that Barrington Road was not properly maintained by the Illinois Department of Transportation whose duty it was to maintain that road.

Mr. Lippman did acknowledge that if the vehicle went off the road where Claimant indicated she went off the road, the vehicle's tires wouldn't have scrubbed at the point where the pictures indicate the shoulder had the drop-off. Mr. Lippman further acknowledged he could see no potholes on the road in the pictures taken in June 1982. Mr. Lippman did indicate that although he saw no pictures, the lack of maintenance of the shoulders in the one location could indicate lack of maintenance further down the road.

The Respondent called Michael Fitzgerald to testify as their sole witness. Mr. Fitzgerald was the claims manager for the Illinois Department of Transportation. He was familiar with Barrington Road at the location of Claimant's accident. The Respondent's records indicated that the road was constructed in 1932 and resurfaced in 1979. The Illinois Department of Transportation has a system in place to take complaints about roadways. All complaints are logged in and placed in the communication center in Schaumburg. He found no complaints on file for the roadway for April 5, 1982.

Law

The State is not an insurer of the conditions of the highways under its control but does have a duty to the public to use reasonable care in maintaining its roadways.

(*Cataldo v. State* (1983), 36 Ill. Ct. Cl. 23.) To prevail, the Claimant must prove the State was negligent, that the negligence of the State was the proximate cause of the injury, and that the State had actual or constructive notice of the alleged defect in the roadway where the accident occurred. (*Edwards v. State* (1984), 36 Ill. Ct. Cl. 10.) The Court will also consider comparative negligence of the Claimant in adopting an award. *Alvis v. Ribar* (1981), 85 Ill. 2d 1; *Guffey v. State* (1987), 40 Ill. Ct. Cl. 179; *Koepp v. State* (1993), 46 Ill. Ct. Cl. 344.

The Claimant drove off the roadway. There was no evidence presented to substantiate Claimant's belief that she hit a pothole. Claimant had her vehicle towed prior to making a police report. No proper investigation of the accident was made by the police to locate the exact location where Claimant left the roadway and drove on the shoulder. The photographs taken by Claimant's husband in June failed to show a pothole on the roadway. Claimant presented no proof of any pothole repairs at the location. The Court, therefore, finds that Claimant was negligent in failing to keep her vehicle on the highway. To compound Claimant's negligence of driving off the roadway, Claimant failed to slow down, stop and get back on the roadway which was the proper procedure according to her own expert, Mr. Lippman. Claimant forgot what she had learned and tried to turn back onto the roadway. The cause of this accident and injury was Claimant negligently driving off the roadway and then negligently failing to slow down, stop ad then try to drive back onto the roadway. We find that it was Claimant's negligence that caused the injury and was therefore the proximate cause of Claimant's injuries. *Scarzone v. State* (1990), 43 Ill. Ct. Cl. 207.

Claimant had a duty to keep her vehicle under control and to drive at speeds reasonable and proper under the conditions that exist. (*Harris v. State* (1986), 39 Ill. Ct.

Cl. 176.) This Court held that the adoption of the doctrine of comparative negligence in the State of Illinois did not extinguish the requirement of proximate cause. The failure to establish proximate cause of an injury precludes liability, negating the need to compare fault. (*Nunley v. Village of Cahokia* (1983), 115 Ill. App. 3d 208.) It is clear to the Court that the proximate cause of the accident was the negligent driving of Claimant. She could have avoided the accident by driving on the roadway instead of the shoulder and by slowing down and stopping prior to trying to drive back on the roadway when she did drive on the shoulder. *Calvert v. State* (1985), 38 Ill. Ct. Cl. 104.

Because we find that Claimant, Claire M. Jacobs, has failed to prove her claim by a preponderance of the evidence, Claimant, William E. Jacobs', derivative loss of consortium claim must also fail.

For the foregoing reasons, it is the order of the Court that Claimants' claims be and hereby are denied.

ORDER

FREDERICK, J.

This cause comes before the Court on Claimants' petition for rehearing, and the Court having reviewed the Court's opinion, the Court file, the briefs, and heard oral arguments, and the Court being fully advised in the premises,

Wherefore, the Court finds:

1. That Claimant drove off the road.

2. That while Claimant claimed she hit a pothole which caused her to drive off the road, no pothole was proven and in fact, Claimant's photograph showed no pothole.

3. That instead of having the police sent to the scene, Claimant had her car towed from the scene.

4. That Claimant's photographs were taken almost two months after the accident and without any competent proof that they showed the exact location where she left the road, allegedly scrubbed her tires, and where she ended up.

5. That the Court was and is unable to find that the location where she allegedly left the road and allegedly scrubbed her tires is the same exact location as the location of the prior accident claimant relies on for notice.

6. That Claimant violated the driving skills testified to by her own expert witness.

7. That this accident was caused by Claimant negligently driving off the road and negligently trying to reenter the roadway.

8. This Court has rarely found liability on the part of Respondent in shoulder drop-off cases and we decline to do so with the particular facts of this case and our assessment of the credibility of the witnesses. *Doyle v. State* (1993), 45 Ill. Ct. Cl. 194.

9. That the State has a duty to maintain the shoulder of its highways in a manner reasonably safe for its intended purposes but the standard of care is higher for a highway than the shoulder, since the reasonably-intended use of the highway requires a greater level of care than the shoulder. *Tourloukis v. State* (1995), 47 Ill. Ct. Cl. 155.

10. In the case of *Alsup v. State* (1976), 31 Ill. Ct. Cl. 315, this Court denied a claim where the evidence indicated the claimant failed to slow down prior to returning to the roadway. The Claimant in this case failed to slow down prior to trying to return to the roadway.

11. There is evidence in this case that Claimant was attempting to return to the highway just before the accident occurred.

12. In the case of *Hill v. State* (1978), 32 Ill. Ct. Cl. 482, the claim was denied because the Court found that the simple difference in the levels of the roadway and the shoulder of six inches was not negligent maintenance by the State.

For the foregoing reasons, it is the order of the court that Claimants' petition for rehearing is denied.

(No. 86-CC-0496—Claim denied; petition for rehearing denied.)

STANLEY JUREK, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed December 27, 1996.

Order on petition for rehearing filed June 12, 1997.

MICHELOTTI & ASSOCIATES, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO and ANDREW LEVINE, Assistant Attorneys General, of counsel), for Respondent.

PRISONERS AND INMATES—*State not insurer of inmate's safety—reasonable care.* The State is not an insurer of an inmate's safety, but it must act reasonably in caring for an inmate's safety.

SAME—*scalding liquid thrown on inmate awaiting placement in protective custody—claim denied.* Where prison officials placed the Claimant in a double-locked cell on the same day that the inmate asked for protective custody due to threats made by another inmate, and at the time of the Claimant's request there was no room in the protective custody unit, the State was not liable for injuries received by the inmate when scalding liquid was thrown through his cell door by an unidentified assailant, since the Claimant failed or refused to identify the person who made the initial threat, the State provided him with a higher degree of protection prior to the incident, and the Claimant did not establish that the State acted unreasonably in failing to remove him from the general prison population before the attack.

ORDER

MITCHELL, J.

This cause comes before the Court on Claimant's complaint alleging that Respondent, State of Illinois, was negligent. Specifically, the Complaint alleges that on September 26, 1984, while Claimant was waiting in his cell, an unknown person or persons threw liquid containing bleach and scalding hot water upon his face and chest. The complaint alleges that on September 23, 1984, Claimant requested to be placed in protective custody, due to threats from other prisoners and as of the date of the incident, had not been placed in protective custody. In essence, Claimant complains that Respondent failed to provide proper security to protect him.

A hearing was conducted on August 10, 1995, at which Claimant appeared and testified. Respondent presented one witness. The parties stipulated that the language contained in Claimant's exhibit No. 1 states the rules and regulations in effect on protective custody at the time of the incident.

I. Testimony of Stanley Jurek

Mr. Jurek testified that in September of 1984, he was incarcerated at Menard Correctional Center (hereinafter referred to as "MCC") and was in the south house. In September of 1984, a prisoner came to his cell and told him there was going to be a war and he needed Claimant to make a knife from a piece of metal, known as a "shank." He had never seen him before. He identified himself as affiliated with the north side gang. Mr. Jurek told him he would not make a shank. That night the whole cell house was full of grinding sounds. Other inmates told him that day that there would be repercussions if he did not make the shank. They said something would happen to him. He had seen these prisoners before. He took their threats seriously.

Mr. Jurek called for a guard immediately and told him that he was being threatened and wanted to be placed in protective custody immediately. At this time no one was in his cell. He asked the guards several times to be put in protective custody. Finally, he was double-locked in his cell. When a cell is double-locked, it will not open automatically with the other cells. While double-locked in his cell, the guard let someone in the cell. Claimant complained to the guard that no one was to be added to his cell because he was on "pc lockdown." That particular prisoner was let out of his cell at lunchtime.

Mr. Jurek was not allowed to go out of his cell. His meals were brought to him and served on a tray passed through the bars. When he went to grab for the meal, somebody came by and threw hot bleach in his face. It was extremely painful. Although the person was right in front of his cell, Claimant does not believe he can identify him.

His face, neck and shoulders were touched by the bleach and his skin was rolling off his face. A guard escorted him to the hospital. He was bandaged at the hospital. He was out of the hospital within a couple of hours. He was taken to an office. He was taken to minimum security. The bandages were on for several weeks and were replaced a couple of times. He was not placed in the protective custody area until after September.

Claimant identified Claimant's exhibit nos. 2-A and 2-B as photographs taken of him in the visitors room. He knows they were taken after the incident, he does not know exactly when.

On cross-examination, Mr. Jurek stated that the person who asked him to make a shank was white. He is sure the person told him he was in the north side gang, "at one time or another." He may or may not have told him this at the time of the "shank" conversation. He knew he was in

the north side gang. He was not sure of the exact date of the "shank" conversation, and believes the hot bleach was thrown in his face the next day.

The prisoner who asked him to make the shank told him there would be repercussions if he did not make it. He did not explain what he meant. When he told the guards about the incident, they told him they needed a captain or lieutenant to authorize protective custody. Although he was still in general population, his cell was double-locked. There were no problems between him and the inmate that was placed in his cell for a couple of hours.

There was only one person who threw the bleach. He did not see the person because his meal was being handed to him through the bars. He does not know who it was. He knows it was not the person who had the "shank" conversation the prior day because that person was "a chief in a gang."

He was questioned, but could not identify the attacker. He thinks the bandages were on for a couple of weeks and the photographs were taken in September.

On redirect, Claimant testified that he could identify the person who had the shank conversation as a gang member because of his clothes.

Claimant's exhibit nos. 2-A and 2-B were admitted over Respondent's objections. Claimant's exhibit No. 3, medical records, were admitted without objection.

II. Testimony of Boniface Grace

Respondent presented Correctional Superintendent Boniface Grace. He was shift captain at MCC at the time of the incident. He stated that protective custody is for inmates that want to be separated from general population. When an inmate requests protective custody, he is seen by the assignment committee. If the assignment committee

recommends protective custody, the inmate must await approval by the chief administrative officer. There is a protective custody unit, separated from general population. He described "protective custody deadlock" as a situation when an inmate requests protective custody and there is no room in the protective custody unit intake gallery. The intake gallery is separate from the protective custody unit. When there is no room at the intake gallery, they deadlock the cell. The inmate stays deadlock until the inmate has seen the assignment committee, he is not considered to be in protective custody.

He identified Respondent's exhibit No. 1 as an incident report that he signed. Respondent's exhibit No. 1 was admitted into the record without objection.

III. Arguments

Claimant argues that Respondent was put on notice and had a duty of reasonable care toward Claimant. When an inmate requests protective custody, he must be promptly taken away from general population and put into protective custody. Claimant's complaint does not request any specific dollar amount for damages and Claimant did not argue for any specific dollar amount of damages in his closing argument.

Respondent argues that it is not an insurer of the safety of inmates. Claimant has failed to show that the harm was foreseeable.

No briefs have been received.

IV. Summary

The parties agree that the State is not an insurer of an inmate's safety. The parties also agree that the State must act reasonably in caring for the inmates' safety. (*Dorsey v. State* (1977), 32 Ill. Ct. Cl. 449.) The difference is that Claimant contends that the State breached its

duty of reasonable care by not removing Claimant from general population and placing him in the protective custody unit within what appears to be a time period of 24 hours within his oral request for protective custody. Section 501.320(a) of chapter 20 of the Illinois Administrative Code, specifies, *inter alia*, that:

"The employee to whom such a request is made shall promptly notify the Chief Administrative Officer or his designee. Reassignment from the general population to protective custody shall be accomplished as expeditiously as possible."

Respondent's exhibit No. 1 indicates that there was no room in the protective unit and that at the time of the incident, Claimant was on protective custody deadlock.

This case is similar to *Butler v. State* (1994), 46 Ill. Ct. Cl. 416. In *Butler*, an inmate complained about fear of a further attack and was placed in lockdown, or temporary protective custody, for three days. (46 Ill. Ct. Cl. at 417.) He was never directly threatened with bodily harm by the inmate who ultimately attacked him. He did not give the guards the name of the inmates he suspected were going to attack him. The Court found that the Respondent's agent took steps to protect the claimant.

In the case at bar, it is clear from his testimony that Claimant recognized, or could have recognized, the person who initially had the "shank" conversation with him. He also said other prisoners told him of possible repercussions. Yet, he reported no names or otherwise attempted to identify the first individual, or others. The record indicates that Respondent's agents took steps to provide a higher degree of protection for Claimant prior to the incident.

The Court finds that Claimant has not established by a preponderance of the evidence that Respondent breached its duty of reasonable care. This is based upon the record establishing that Respondent took action the

same day that Claimant requested, *i.e.*, placing the Claimant on protective custody deadlock, which was one day prior to the incident. The Claimant has not established that under these circumstances he should have been removed from general population prior to the incident or that Respondent otherwise breached its duty of reasonable care.

The claim is hereby denied.

ORDER

MITCHELL, J.

This matter comes before the Court on Claimant's motion for rehearing. The Court having reviewed the entire file and the applicable law reiterates that the Claimant has failed to establish by a preponderance of the evidence that the Respondent breached its duty of reasonable care. Therefore, Claimant's motion for rehearing is denied and the original order dated December 27, 1996, is affirmed.

(No. 87-CC-0364—Claim denied.)

JEAN MABLE WOODRING, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 8, 1997.

COOK, SHEVLIN, YSURSA, BRAUER & BARTHOLOMEW (GREGORY SHEVLIN, of counsel), for Claimant.

JIM RYAN, Attorney General (NUVIAH SHIRAZI, Assistant Attorney General, of counsel), for Respondent.

Negligence—*what Claimant must prove.* In order to recover against the State for negligence, the Claimant must prove by a preponderance of the evidence that the State had a duty to the Claimant, that the State was negligent,

that the negligence was the proximate cause of the Claimant's injuries, and that the Claimant suffered damages.

EMPLOYMENT—*when principal is liable for acts of agent.* A principal is liable for the acts of his agent committed within the scope of the agency, and whether a contractor is a servant-agent or an independent contractor focuses on the principal's right to control the manner and method in which the work is done, and among the indicia used to evaluate whether a right to control exists are the method of payment, the right to discharge, the skill required, and the furnishing of tools and equipment.

SAME—*when principal can be held liable for acts of independent contractor.* A principal can be held liable for the acts of an independent contractor when the act causing the injury was committed at the direction of the principal, or if the principal failed to use reasonable care in the selection of the independent contractor, and in a claim for negligent hiring, it must be shown that the employer knew or should have known that the independent contractor's unfitness posed a danger to others, and that there was a causal connection between the unfitness and the negligent act.

NEGLIGENCE—*automobile accident—driver was independent contractor hired by State—causation lacking—passenger's negligent hiring claim denied.* A public aid recipient who was injured in an automobile accident while being driven to a doctor's appointment by a service car driver hired by the State was denied recovery in her negligent hiring claim, because although it was established that the driver, an independent contractor, was elderly and had an atrophied hand and no liability insurance, the Claimant failed to prove by a preponderance of the evidence that any of those conditions caused the accident.

OPINION

JANN, J.

The Claimant, Jean Mable Woodring, brings this action for compensatory damages pursuant to section 8 of the Illinois Court of Claims. (705 ILCS 505/8.) The Claimant asserts that she was injured as a direct and proximate result of negligence committed by the State of Illinois which allegedly resulted in a traffic accident on Interstate 57 in Pulaski County.

At approximately 2:40 p.m. on August 29, 1985, the Claimant was a passenger in a 1977 Impala station wagon driven by John D. Frey, Sr., who was working as a service car driver for the Illinois Department of Public Aid, hereinafter referred to as "the Department." Mr. Frey was

driving the Claimant from a doctor's appointment in Carbondale to the Claimant's home in Cairo. The medical transportation program was a service provided by the Department to recipients of public aid. Claimant was a public aid recipient. After passing one or more vehicles, Mr. Frey's automobile drove off the right side of the road and struck a tree, killing Mr. Frey and injuring the Claimant.

After the accident, the Claimant was taken to Union County Hospital, where she remained for about a month. The Claimant suffered a dislocated left hip, fractured left pelvis, fractured lower right leg, fractured upper left arm, and contusions and lacerations to her chest, abdomen and right elbow. As a result of the injuries, the Claimant continues to suffer pain and has permanent scarring. The Claimant was unable to work for about eight months as a result of her injuries. She is seeking $21,138.02 for medical bills, $6,489.60 in lost wages, and an unknown amount for pain, mental anguish and possible future medical treatment.

The Claimant asserts that the Department was negligent in the following respect:

1. By and through its agent, servant or employee who failed to keep his vehicle under proper control.
2. Failing to adequately screen applicants, including Mr. Frey, for participation in the medical transportation provider program.
3. Failing to remove or revoke Mr. Frey's privileges when the Department knew or should have known that such was necessary to prevent injury to the public aid clients, including the Claimant.

A hearing was held before Commissioner Clark on June 29, 1995, at which there was testimony for the Claimant; Stan Weder, custodian of records for the Illinois

comptroller's office; Richard Branon, a former supervisor of the Department's medical transportation unit; Donna Withrow, executive supervisor of the Department's provider participation unit; Jessie Jean Ratliff, the Claimant's former caseworker at the Department; and Lesley F. Honey, the Department's county administrator for Alexander County. In addition, the Commissioner admitted into evidence the Claimant's medical bills; the Claimant's request to admit and the Respondent's answers; a deposition from Mrs. Ratliff; the Claimant's medical records; the application Mr. Frey submitted to become a provider of medical transportation services; the medical provider agreement between the Department and Mr. Frey; a record of public aid payments made to or on behalf of the Claimant for medical services stemming from the accident; prior approval requests recording the dates on which Mr. Frey drove the Claimant to doctors' appointments; medical records of the Claimant; and portions of a transcript of testimony at an inquest hearing from Robert Peller, a witness to the accident. The parties submitted no briefs.

The Claimant testified that the procedure for receiving medical transportation from the Department was for her, as the client, to call workers at the local office of the Department and tell them that she needed to go to a doctor's appointment. She would tell workers at the office when her appointment was, and the workers would tell her who would take her to and from the appointment. Regarding Mr. Frey, the Claimant testified that she had driven with him before and did not like his driving. She stated that she was afraid of Mr. Frey's driving because he was old (76 years old at the time of the accident) and because he could only use one hand because the other hand was atrophied. The Claimant testified that she told her caseworker, Mrs. Ratliff, of her concerns prior to the accident.

Prior to the accident, the Claimant arranged for transportation from the Department in the way described above. She testified that she was to be taken by a Rev. Oliver on August 29, 1985. However, the day before the Claimant's doctor appointment, the Department called and informed the Claimant's son that Rev. Oliver was unable to take the Claimant and that Mr. Frey would drive her. The Claimant testified that she found out about the change late in the day, and it was too late to get in touch with the Department to get another driver.

The Claimant testified that the trip from Cairo to Carbondale was uneventful and that Mr. Frey committed no traffic violations during that time. The Claimant stated that on the return trip southbound on Interstate 57, a four-lane divided highway, Mr. Frey passed a green truck that was in the right lane. She said Mr. Frey then drove onto the grass on the median, back to the right lane and off the road. The Claimant testified that when Mr. Frey passed the truck, he was driving 62 mph.

Robert Peeler testified that he was driving a green military-type vehicle on Interstate 57 south from Carbondale to Cairo and was traveling at 50-52 mph. Mr. Peeler stated that Mr. Frey's car passed him at approximately 57-58 mph, passed another car in front of him, then ran off the road and struck a tree.

The Claimant was hospitalized for about a month at Union County Hospital, where doctors put a pin in her arm. When the Claimant was released from the hospital, she wore casts on her right leg and left arm and was bedridden. She underwent in-home therapy until January 1986 and then went to therapy in Cape Girardeau until April or May 1986. The Claimant stated that she still has to do exercises and still suffers pain in her right leg, left arm, back and left hip. She testified that her left arm does

not work as well as her right and that she has a five-inch scar on her upper left arm, a one and one-half inch scar on her chest, a half-inch scar on her abdomen and a two-inch scar on her right elbow. The Claimant stated that she also suffers from swelling in her ankle and leg. She said public aid paid for all of her medical and hospital bills from the accident, except for psychiatrist bills.

The Claimant testified that she was an unemployed teacher at the time of the accident. She got a teaching job in 1991 for approximately $5.43 per hour. However, she had to quit that job because her injuries prevented her from climbing stairs. She was able to return to work eight months later.

Stan Weder, custodian of records at the Illinois Comptroller's Office, testified that service car providers, like Mr. Frey, are not considered to be employees of the State. There are no taxes withheld from their checks, they receive no state benefits, they do not receive a W2 income tax form, they are paid from a different fund than employees, and they are paid after submitting bills to the Department.

Richard Branon, former supervisor of the Department's medical transportation unit, also testified that service care providers were not considered employees. He stated that they are paid $7 for the first ten miles driven and 50 cents for each mile after that. The State does not provide cars, gasoline, nor repairs for service car providers. Mr. Branon testified that to become a service car provider, a person must fill out an application, be a licensed driver, and own his or her own vehicle. An applicant does not have to provide proof of insurance to the Department. Furthermore, there are no periodic reviews of providers' performance, and providers do not have to reapply or renew their privileges. Mr. Branon stated that

the Secretary of State's office was the agency charged with dealing with whether drivers have insurance. However, the Secretary of State's Office was not involved with the provider selection process. Mr. Branon did state that if the Secretary of State did not require drivers to have insurance, that would be a concern, and requiring insurance to cover client passengers would be desirable. In addition, Mr. Branon testified that public aid recipients needing transportation to doctors' appointments would schedule their appointments and contact the Department for transportation.

Donna Withrow, executive supervisor of the Department's provider participation unit, also testified that service car providers are considered to be independent contractors and not employees of the State. Ms. Withrow also testified that the medical provider agreement in which service car providers enter into states that providers must comply with federal and state laws. She also stated that there is no review process for providers. She testified that if state statutes required that a service car driver had to meet certain qualifications or get a certain type of insurance, the provider would independently be required to do so himself.

Jessie Jean Ratliff, the Claimant's former caseworker at the Department, testified that the procedure for clients to receive medical transportation was that the client would call his or her caseworker, and the caseworker would tell the client to call the provider. She stated that the Department rarely called providers for clients. Regarding the Claimant, Mrs. Ratliff testified that the Claimant had expressed a concern about Mr. Frey's atrophied hand. However, she stated that she herself was not concerned about Mr. Frey's ability to drive. On cross-examination, Mrs. Ratliff testified that she was never instructed

about any procedure regarding handling complaints about a provider or regarding any problems with providers, but she assumed that she would go to her supervisor. On redirect, Mrs. Ratliff stated that she did not feel a need to go to her supervisor about the Claimant's comments about Mr. Frey, and that the Claimant had a choice of who would provide medical transportation.

Lesley Honey, former caseworker supervisor, testified that he did not recall any complaints about Mr. Frey's driving. He stated that he might want to know if a client did not feel safe with a certain provider, "but there wouldn't be anything I could necessarily do about it."

In order to recover against the State for negligence, the Claimant must prove by a preponderance of the evidence that the State had a duty to the Claimant, that the Respondent was negligent, that the negligence was the proximate cause of the Claimant's injuries, and that Claimant suffered damages. *Russell v. State* (1990), 42 Ill. Ct. Cl. 83.

The Claimant first asserts the State was negligent through its agent or employee, Mr. Frey. A principal is liable for the acts of his agent committed within the scope of the agency. (*Lewis v. Mount Greenwood Bank* (1st. Dist. 1980), 91 Ill. App. 3d 481, 414 N.E.2d 1079, 46 Ill. Dec. 926.) Whether a contractor is a servant-agent or an independent contractor is an issue which focuses on the principal's right to control the manner and method in which the work is to be done. Among the indicia used to evaluate whether such a right to control exists are the method of payment, right to discharge, the skill required, and the furnishing of tools and equipment. *Id.*

In looking at such indicia in light of the facts of the instant case, it appears that Mr. Frey was an independent contractor. Although there was no evidence presented on

whether the State had a right to discharge Mr. Frey, he was paid from a separate fund from traditional State employees, there were no taxes withheld from his pay, he was paid by the mile and not the hour, and he received no benefits. In addition, Mr. Frey furnished his own car. Therefore, we find that Mr. Frey was not an agent or employee of the State.

Regarding the second and third claims of the Claimant, there are two instances when a principal can be held liable for the acts of an independent contractor. First, if the act causing the injury was committed at the direction of the principal, or, second, if the principal failed to use reasonable care in the selection of the independent contractor, the principal can be held liable. (*Lewis*, 91 Ill. App. 3d at 487.) Regarding the first instance, it is clear in the case at bar that the act that caused Claimant's injury was Mr. Frey driving off of the road and into a tree. The State obviously did not direct Mr. Frey to do this.

Regarding the second instance, this State has adopted the view of the Restatement (Second) of Torts sec. 411, which states:

> "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor.
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons."

See *Gomein v. Wear-Ever Aluminum, Inc.* (1971), 50 Ill. 2d 19, 22, 276 N.E.2d 336. In *Gomein*, the Court found that the company that hired an independent contractor to solicit business for the company could be liable for an automobile accident that occurred while the contractor was driving during the course of his solicitations. (*Id.* at 24.) The Court stressed that the operation of an automobile was not an act collateral to the performance of the work

for which the contractor was engaged, but it was part of the conduct directly involved in the performance of the work contracted for. (*Id.*) However, it must be noted that in *Gomein*, the Court reversed dismissal of the complaint. The Court did not decide whether the facts of the case supported a finding of liability.

Considering the facts in the instant case, it is clear that Mr. Frey was directly involved in the performance of the work contracted for when he was driving the Claimant home from the doctor's office. Under the Restatement approach, adopted by the Court in *Gomein*, the State can be held liable for harm to the Claimant caused by the State's failure to exercise reasonable care to employ a competent and careful contractor to do work which will involve a risk of physical harm unless it is skillfully and carefully done or to perform any duty which the employer owes to third persons. Operating an automobile does involve some skill and care. That is why drivers must take examinations and are issued licenses to lawfully drive in the State of Illinois. Furthermore, the State owes a duty to third parties such as the Claimant in that the State is providing a service for public aid recipients and must attempt to make certain that service is rendered with skill and care.

However, the analysis does not end here. A cause of action for negligent hiring must establish that a particular unfitness of an independent contractor creates a danger of harm to a third person which the employer knew, or should have known, when he hired and placed the independent contractor in employment where he could injure others. (*Huber v. Seaton* (2nd Dist. 1989), 186 Ill. App. 3d 503, 508, 542 N.E.2d 464, 134 Ill. Dec. 285, *cert. denied* (1989), 128 Ill. 2d 633, 548 N.E.2d 1069, 139 Ill. Dec. 513.) In addition, the Claimant must also establish a causal relationship between the particular unfitness and

the negligent acts of the agent. (*Id.*) In *Huber*, the Court reversed a jury's verdict against a landlord whom the plaintiffs alleged negligently hired a plumbing contractor who left a valve open on a propane torch which burned down the plaintiffs' home and destroyed their belongings. (*Id.* at 505.) The plaintiffs alleged that the plumber's particular unfitness, of which the landlord should have been aware, was that the plumber was not licensed, as state law required, and that the plumber did not have liability insurance. *Id.* at 506-507.

In the instant case, the Claimant's allegations are similar. Claimant asserts that Mr. Frey's particular unfitness was that he had no liability insurance, as required by state law, and/or that he was an unfit driver because of his atrophied hand and age. Section 601 of Chapter 7 of the Illinois Vehicle Code states that no person shall operate, register or maintain registration of a motor vehicle designed to be used on a public highway unless the motor vehicle is covered by a liability insurance policy. (625 ILCS 5/7-601.) It may be negligent of the State to fail to ascertain whether its independent contractors were in compliance with state law and to fail to have in place some kind of procedure to re-evaluate its medical transportation providers for fitness to drive public aid clients.

However, as the plaintiffs in *Huber* failed to establish that the statutory violation of failing to have a plumbing license was the proximate cause of the plaintiffs' injuries, the Claimant in the instant case failed to establish that either Mr. Frey's lack of insurance or his atrophied hand was the cause of the Claimant's injuries. Certainly it is clear that the failure to have insurance does not cause a driver to run off of a road and strike a tree. Mr. Frey's physical condition could have caused the accident. The State had notice of Mr. Frey's condition in that the Claimant reported to her caseworker that she was afraid to ride

with Mr. Frey because of his hand and his age. However, no evidence—only speculation—was submitted as to whether Mr. Frey's condition was in fact the cause of the accident. The Claimant has failed to prove by a preponderance of the evidence that Mr. Frey's hand or age was the cause of the accident or that he was unfit to drive.

This claim is hereby denied.

(No. 87-CC-1180—Claim denied; petition for rehearing denied.)

DONNA F. PESSIN, as Executrix of the Estate of STUART I. PESSIN, deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed November 19, 1987.

Opinion and order filed February 25, 1988.

Order filed May 17, 1993.

Opinion filed October 27, 1995.

Order on petition for rehearing filed March 27, 1997.

PESSIN, BAIRD, BELSHEIM & WELLS (ROBERT E. WELLS, JR., of counsel), for Claimant.

JIM RYAN, Attorney General (MICHAEL WULF, Assistant Attorney General, of counsel), for Respondent.

DAMAGES—*whole life insurance not subject to set-off.* Although under section 26 of the Court of Claims Act, when a tort Claimant has received satisfaction of a claim from another source, any recovery awarded by the Court shall be subject to the right of set-off, whole life insurance constitutes a preexisting property right which has no relationship to the tortious damage, and it is therefore not subject to set-off.

HIGHWAYS—*State not insurer against every accident on its highways.* The State is not an insurer against every accident on its highways, even if the accident is caused by a defect in the highway, but the State does have a duty to keep its highways reasonably safe for ordinary travel by persons using due care and caution for their safety.

SAME—*required proof in highway defect case—State's duty to remedy defect.* A Claimant in a highway defect case is required to prove by a preponderance of the evidence that a defect or hazardous condition existed at the

accident site, that the State had actual or constructive notice of the condition, and that the condition was the proximate cause of the accident, and the State's duty to remedy a defect or hazardous condition depends upon the magnitude of the risk involved, the burden of requiring the State to guard against the risk, and the consequences of placing such a burden on the State.

SAME—*water on highway—insufficient proof that decedent's car hydroplaned—wrongful death claim denied.* A wrongful death claim brought by the widow of a man killed in a head-on collision was denied where, notwithstanding allegations that the State negligently failed to remedy a known hazardous condition of standing water on the roadway thereby causing the decedent's car to hydroplane and spin out of control, the Claimant failed to present any physical evidence of hydroplaning, and the State did not breach its duty of care given the relatively low incidence of accidents at the site for the volume of traffic involved, and the great burden which would have been placed on the State in order to repair the site.

OPINION

SOMMER, J.

This cause coming to be heard on the Respondent's motion to dismiss, and the parties having been heard, and the Court being fully advised in the premises:

Finds that the Claimant has received over $300,000 from various life insurers of the Claimant's decedent. The terms of the life insurance policies are not determinable from the present record. The Respondent has moved to dismiss based on the long standing precedent of this Court which holds that the State is entitled to set-off the amounts of certain recoveries accruing to the Claimant. Further, that when such set-off reaches the jurisdictional limit of $100,000, the claim against the State is dismissed.

However, this Court has not ruled on whether life insurance proceeds are subject to the set-off. It would seem that a whole life policy is a contract from which recovery necessarily would occur someday. Therefore, proceeds from a typical whole life insurance policy are not subject to the set-off. It is therefore, ordered that the Respondent's motion to dismiss is denied and that this claim be sent to a commissioner for hearing.

OPINION AND ORDER

SOMMER, J.

This cause coming to be heard upon the Respondent's petition to reconsider this Court's ruling of November 19, 1987, due notice having been given, and this Court being fully advised in the premises:

Finds that not every claim accruing to a decedent's personal representative, heirs, etc., because of the event of the decedent's death is subject to being set-off under section 26 of the Court of Claims Act. Ill. Rev. Stat. 1985, par. 439.24-6.

The above section states the set-off rule. "There shall be but one satisfaction of any claim or cause of action and any recovery awarded by the Court shall be subject to the right of set-off."

It is the Respondent's argument that section 26 means that "No Claimant may be compensated by a Court of Claims award * * * when that Claimant has already been satisfied from any other source." *Page 6 - Respondent's Memorandum.*

"'Satisfaction'" is defined as * * * paying a party what is due him * * * or awarded to him by the judgment of a Court or otherwise." (*Black's Law Dictionary* 4th Edition, p.1509.) For example, however, for this Court to rule that a decedent's spouse succeeding as a joint tenant to the marital home because of the decedent's tortious death may not recover damages in the Court of Claims because she has already been satisfied would not be credible. This is because the benefit received by the spouse is not satisfaction. It is not a payment of damages by a tortfeasor to compensate for the injury, rather it is pursuant to a pre-existing property right which has no relationship to the tortious damage.

Whole life insurance is much the same. The benefit is pursuant to a pre-existing contract, paid for by the decedent, which will be performed someday no matter how the death is caused. The value may seem to be related to the tortious damage, but it is more a matter of actuarial tables and willingness to pay. A 90-year-old man is compensated the same as a 40-year-old man.

The rule in this order is to apply to whole life insurance only. It is therefore ordered that the Respondent's petition to reconsider this Court's ruling of November 19, 1987, is denied, and the commissioner is instructed to take evidence of the terms and conditions of insurance payments made and include such in his report to this Court.

ORDER

SOMMER, C.J.

This cause coming to be heard on the motion of the Court, and this matter having been argued before this Court on February 18, 1993, and this Court being fully advised finds:

1. That this Claim was tried before the commissioner on June 3, 1991.

2. That the commissioner ruled, subject to the opinion of this Court, that a retained expert witness, Robert Mains, might testify on behalf of the claimant.

3. That at no time was disclosure of this expert's identity made to the respondent pursuant to Supreme Court Rule 220(b).

4. That no scheduling orders were entered concerning disclosure of experts; and the respondent did not attend any of the pre-trial proceedings where such might have been discussed.

5. That the Respondent's attorney objected to the testimony of the expert at the trial, due to lack of disclosure.

6. That this Court is required to strike the testimony of the expert under Rule 220(b). *Barth v. Reagan* (1990), 39 Ill. 2d 399; *Wakeford v. Rodehouse Restaurants of Missouri, Inc.* (1992), 154 Ill. 2nd 543.

7. That the purpose of the timely disclosure of expert testimony is to avoid surprise.

8. That justice would be best served by this Court's remanding this claim to the commissioner for re-trial and scheduling of expert testimony.

It is therefore ordered that this Claim be remanded to the commissioner for re-trial. The commissioner shall make scheduling orders allowing for the disclosure of expert testimony, including the testimony of Mr. Mains; and the parties by stipulation may preserve any testimony from the June 3, 1991, trial.

OPINION

SOMMER, C.J.

This is a wrongful death action brought by the executrix and widow of Stuart Pessin, deceased, on behalf of the decedent's estate, herself, and the decedent's two minor children.

The Claimant's deceased husband, Stuart Pessin, was driving his automobile on Illinois Route 15, St. Clair County, Illinois, on December 9, 1985. At approximately 6 p.m. the decedent's automobile veered into oncoming traffic, where it spun and collided with an automobile head-on, killing Mr. Pessin. At the site of the accident, approximately one-half mile east of the Lady of Snows Shrine, the highway was four lanes, gently curving to the right when driven westerly, and divided by a median

three inches high. The decedent was driving westerly in the inside lane.

Evidence introduced at the hearing indicated that there was light rain at the time of the accident; and it had been raining for at least an hour before the accident, accumulating to about one-tenth (.1) of an inch. There was testimony that water was standing to a maximum depth of one to one-and-a-half (1-1½) inches in the inside lanes of the highway; and records of the Department of Transportation indicate that water tended to pool in the inside lanes during heavy rains, probably due to a heaving of the outer lanes, inadequate drainage, and rutting.

The Claimant's theory of the accident is that Mr. Pessin's automobile hydroplaned upon hitting standing water and went across the low median uncontrollably. Additionally, the absence of super-elevation at the curve would tend to cause an automobile to drift toward the median when traveling westerly; and the lower median would not restrain an out-of-control automobile. Hydroplaning upon the accumulation of water in combination with the other cited factors is alleged to have been the cause of the accident; and the accumulation of water allegedly was due to the negligent inaction of the Department of Transportation. Said Department, the Claimant maintains, had notice of the condition, due to five other accidents which had occurred at the site prior to the present accident over an almost five-year period.

If this Claim had been made against a unit of local government, it would be subject to a motion to dismiss, as injuries caused by the effect of weather conditions on local roads are not compensable. (745 ILCS 10/3-105.) However, no such statute applies to State highways.

The State is not an insurer against every accident on its highways, even if the accident is caused by a defect in

the highway. (*Scroggins v. State* (1991), 43 Ill. Ct. Cl. 225.) The State has a duty to keep its highways reasonably safe for ordinary travel by persons using due care and caution for their safety. (*Berry v. State* (1968), 26 Ill. Ct. Cl. 377.) Liability has been found for failure to maintain its highways when the State had actual or constructive notice of the hazard created by the failure of maintenance. *Siefert v. State* (1989), 42 Ill. Ct. Cl. 8.

A Claimant is required to prove by a preponderance of the evidence that a defect or hazardous condition existed at the site of the accident; that the State had actual or constructive notice of the defect or hazardous condition; and that the defect or hazardous condition was the proximate cause of the accident. (*Cataldo v. State* (1983), 36 Ill. Ct. Cl. 24.) The State's duty to remedy a defect or hazardous condition depends upon the "magnitude of the risk involved, the burden of requiring the State to guard against the risk, and the consequences of placing such a burden on the State." *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50, 55.

In the present Claim, reports compiled by the Department of Transportation since 1980 indicate an awareness of a problem of standing water on Route 15 near the scene of the accident. Various corrections subsequently were suggested.

In early 1987, after the accident in this claim, but prior to any repairs being made to Route 15, District 8 of the Department of Transportation prepared a project report covering Route 15 from the Shrine entrance to Illinois Route 13. The accident statistics in the report were from 1981 through 1986. Excerpts from the project report are as follows:

"The purpose of this project is to improve a hazardous highway section which has contained several identified high-accident locations * * * .

* * * An inordinately high number of accidents (19%) along this stretch involve vehicles crossing over the raised median. Three fatalities have occurred as a result thereof. Of these cross-over accidents, 39% were wet road and 6% were ice/snow related.

The primary cause of accidents along this section is vehicle hydroplaning resulting from severe rutting * * *.

Other conditions which contribute to retaining water on the pavement are shoulders which drain toward the roadway, low super-elevation and extreme rutting * * *."

In the present case, no one knows what caused the accident, as the driver did not survive. According to eye witnesses, the driver was not speeding, and the automobile experienced no mechanical failure that could be detected afterward. Kevin Mafpe, an eye witness, stated that "* * * it was immediate, he didn't fishtail or anything, he just came across the median." Henry John Brenner, another eye witness, stated that Mr. Pessin's auto "veered off."

This Court has made awards in cases of accidents allegedly caused by water standing on a highway: *National Bank of Bloomington v. State* (1980), 34 Ill. Ct. Cl. 23; *Sallee v. State* (1990), 42 Ill. Ct. Cl. 41; *Scott v. State* (1990), 43 Ill. Ct. Cl. 85; and has denied others: *English v. State* (1982), 35 Ill. Ct. Cl. 180; *Reidy v. State* (1975), 31 Ill. Ct. Cl. 53; *Wilson v. State* (1989), 41 Ill. Ct. Cl. 50.

An examination of the claims in which awards were made or denied for accidents allegedly caused by water standing on the highway leads to the conclusion that each claim turns on the facts peculiar to it. Some of the claims lacked notice by the State of a hazardous condition. In others deep water was hit. In only one claim was hydroplaning found to be a cause sufficient for recovery, that being in *Sallee*.

In *Sallee*, there was approximately one inch of water standing across the highway. The state trooper who was first on the scene testified to "skid marks beginning where the automobile hit the water." (*Sallee*, p. 45.) Additionally,

the roadway was covered with water over its entire width for ten feet.

In *National Bank of Bloomington*, the driver who was killed hit standing water eight to ten inches deep. In *Scott*, there was testimony that the auto did not hydroplane but hit deeper water and veered.

In *English*, the Court refused to draw the conclusion that the vehicle that crossed the center line in rainy conditions hydroplaned, even though an expert and a state trooper testified that hydroplaning occurred. The Court ruled that to find that the collision occurred because of hydroplaning is speculation. The driver survived the accident, but he did not testify. Additionally, there were unresolved questions regarding the presence of liquor and the condition of the automobile. In *Wilson*, there was no proof of what caused the accident, though there was water standing on the road.

In the present claim, the Claimant's expert, Robert Mains, after reviewing documents obtained from the Department of Transportation, testified that to a reasonable degree of engineering certainty the highway in question was unreasonably dangerous at the time of the accident; and that such condition was reasonably foreseeable by the State. When asked whether to a reasonable degree of engineering certainty the "unreasonably dangerous condition" caused the fatal accident, he responded, "It certainly was highly contributory."

The Claimant's second expert, Duane Dunlap, concurred in his deposition with Mr. Mains' assessment. The only difference in his opinion testimony was that in response to the question concerning whether the "unreasonably dangerous condition" was a proximate cause of Mr. Pessin's accident, he answered, "Yes." He further testified that the action of the automobile was "certainly

consistent with a hydroplaning accident." Mr. Dunlap then provided a detailed discussion of hydroplaning.

Mr. Dunlap testified that in circumstances of hydroplaning, even at or lower than at highway speeds, a driver would have little expectation of the dangers ahead and would have little or no control over the vehicle once it began to hydroplane. He testified that such acts as applying the brakes, steering to avoid the hazard and taking one's foot off the gas pedal could make the danger worse.

In addition, there was evidence that Mr. Pessin's vehicle was inspected per State of Missouri regulations just four days before the accident, and there was no evidence of vehicular defects.

The Claimant's attorneys are asking us to make certain findings in order to establish liability on the part of the State. First, that the decedent's automobile hydroplaned on water standing against the center median and that said hydroplaning was the proximate cause of the accident. Second, that the condition of the road at the accident site was unreasonably dangerous; that the State had knowledge of the condition because of its studies and the number of accidents that occurred at the site; and that the State failed in its duty to eradicate the unreasonably dangerous condition.

As to the first issue, there was no physical evidence of hydroplaning as there was in *Sallee*. The Claimant presented a case for hydroplaning which did not necessarily exclude other causes.

> "The causes of one skidding an automobile on a wet or icy pavement are manifold, and are most often hidden within the breast and mind of the operator of the skidding car." *Murphy v. Kempler* (1951), 344 Ill. App. 287, 100 N.E. 2d 660, 662.

Both of the Claimant's experts testified that the action of the decedent's automobile was "consistent" with

hydroplaning. As in *English*, we find that the testimony by the Claimant's experts that the decedent's automobile hydroplaned was speculative and not sufficient proof of hydroplaning. Indeed, the testimony in *English* was more emphatic than that in the present claim.

As to the second issue, the experts testified that the highway at the scene of the accident was unreasonably dangerous due to the tendency of water to flow to the inner lanes along the media, the low median itself, the rough road, the lack of super-elevation at the slight curve where the accident took place, and the accident history at the site.

The Department's project memorandum of April 17, 1987, (Claimant's exhibit #11), from which many of the quotations and statistics in the Opinion derive, states that the average daily traffic volume was 13,600 in 1985. The Claimant's expert, Mr. Mains, referred to the average daily traffic volume in his testimony and characterized it as "moderately high volume." The average daily traffic count when extended over a year would give a count of approximately five million vehicles on the road in question per year. The number of automobiles going through the accident site in the westerly lane would be at least 2.5 million. The only accident at the site in 1985 was the decedent's. Over six years, at least 15 million automobiles would be in the position of the decedent's; and yet only eight accidents occurred at the site, four in wet weather. Prior to the present accident there were five accidents at the site in the preceding five years; none were fatal.

Hundreds of thousands of motorists went through the accident site without accidents in wet weather in 1985; and a few million vehicles went through the accident site over six years in wet weather, with four accidents occurring in wet weather. Thus, the number of accidents

at the site compared with the traffic count appears very low. The fact that three of the accidents at the site were head-on and three were sideswipes over a six-year period indicates that when accidents did occur they had a potential for substantial harm. Head-on accidents are more severe due to the doubling of the impact velocity.

The State's duty to remedy a hazardous condition, if we were to find that such existed at the crash site, depends as stated in *Wilson* upon the "magnitude of the risk involved, the burden of requiring the State to guard against the risk, and the consequences of placing such a burden on the State."

We have seen that when accidents did occur at the site of the present accident there was a risk of substantial harm. We have seen also that in light of the traffic flow volume past the site of the accident the incidence of accidents appears minimal, though no testimony was entered on this point by either party. The project report speaks of "high-accident locations" which do include the accident site. However, this is a conclusion drawn by the writer of the 1987 report and is not binding on this Court when considering an accident which occurred in 1985.

The burden placed on the State to remedy the condition at the crash site was great. Apparently, warning signs or lights would not have been a sufficient remedy. According to Mr. Dunlap, signing would have been of "minimal use" and a flashing light "might have some effect." Both experts agreed that the proper remedy was to build a new road and install median guards.

The consequences of the burden placed on the State would be that the State would have to make a determination based upon accident history and road conditions that it must act. The State would then have to develop plans, obtain priority for funding over other sites in the State

with accident histories, have the funds allocated and let contracts. All this would have to be undertaken and completed on the evidence of five accidents over the previous five years, of which this Court knows little as to the cause or fault of the drivers, and on the fact that there were no fatalities at the accident site at issue for over five years prior to the Claimant's decedent's accident in late 1985.

The lack of substantial accident history when compared with the fact that a few million automobiles passed through the accident site in wet conditions without fatal mishap, coupled with the fact of the great burden placed upon the State to repair the site and sites like it, leads us to the finding that the State did not breach its duty when it did not repair the site prior to the Claimant's decedent's accident. It is therefore ordered that this Claim is denied and dismissed.

ORDER ON REHEARING

SOMMER, C.J.

This cause returns on Claimants' petition for rehearing following the opinion of this Court entered on October 27, 1995. Claimants' petition was argued before the full Court on November 12, 1996, after having been scheduled on previous occasions which were inconvenient for one or more of the parties.

This Court's opinion set forth the elements which were Claimants' burden to prove in order to sustain this claim:

> "A Claimant is required to prove by a preponderance of the evidence that a defect or hazardous condition existed at the site of the accident; that the State had actual or constructive notice of the defect or hazardous condition; and that the defect or hazardous condition was the proximate cause of the accident." *Cataldo v. State* (1983), 36 Ill. Ct. Cl. 23, 25.

Claimants once again argue that various defects in the highway, in conjunction with rain, caused the decedent's automobile to hydroplane, which led to his death.

This Court has never found hydroplaning to be the proximate cause of any automobile accident unless there was some actual physical evidence of hydroplaning. To reflexively conclude that hydroplaning occurred just because a highway was wet is not permissible, for that is too speculative. *English v. State* (1982), 35 Ill. Ct. Cl. 180, 185.

It is undisputed that there was no physical evidence here of hydroplaning. Nonetheless, Claimants contend that hydroplaning should be found to be the proximate cause based on testimony from one of Claimants' experts and portions of a 1993 request for admissions that was never answered by Respondent.

Expert testimony requires more than speculation:

"[T]he existence of a fact may not be inferred when the existence of a fact inconsistent with the first can be inferred with equal certainty." *Damron v. Micor Distributing, Ltd.* (1995), 276 Ill. App. 3d 901, 909, 658 N.E.2d 1318, 1324.

Here, one of Claimants' experts testified that the action of the decedent's automobile was "consistent with" hydroplaning. Of course, the action of the vehicle would also be consistent with the decedent's having fallen asleep, with the decedent's having taken his eyes off the road to tune the radio, or with many other possible causes uniquely within the decedent's control. Thus, the expert's hydroplaning theory does not meet the *Damron* standard, for there is nothing to rule out the equal viability of alternate theories of causation.

With respect to the unanswered request for admissions, Claimants' counsel did not "prove-up" the unanswered requests as required by Illinois law. (See, *e.g., Banks v. United Insurance Co. of America* (1975), 28 Ill. App. 3d 60, 62, 328 N.E.2d 167, 169.) And even if Claimants were somehow to be entitled to place the unanswered requests into evidence at this late stage, there is

nothing in them which proves that the decedent's automobile had actually hydroplaned. Rather, request no. 28 states:

"The primary cause of accidents along Illinois Route 15 east of Route 157 in the area when the accident to decedent, Stuart I. Pessin, occurred was hydroplaning resulting from severe rutting * * *."

and request no. 40 states:

"The testimony of the eyewitnesses is consistent with the decedent's vehicle hydroplaning."

These requests, even if taken in the light most favorable to Claimants, simply do not satisfy Claimants' burden of proving that this particular accident was actually caused by hydroplaning.

In short, Claimants merely advanced a theory as to how the accident occurred; they failed to produce sufficient evidence to sustain that theory and meet their burden of proof on causation.

Claimants' failure to sustain this burden of proof is dispositive of the litigation. Accordingly, we need not address Claimants' criticisms of the court's statistical analysis of the traffic data from the accident site.

It is therefore ordered that Claimants' motion for rehearing is denied.

(Nos. 87-CC-2817, 87-CC-2905 cons.—Claims dismissed.)

HOPE D. HUGHES, and MARJORIE OCASEK, as Administrator of the Estate of DONNA SCALAFANI, Deceased, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed April 25, 1997.

REIBMAN, HOFFMAN & BAUM, and CONNEY & CONWAY, for Claimants.

JIM RYAN, Attorney General (SEBASTIAN N. DANZIGER, Assistant Attorney General, of counsel), for Respondent.

LIMITATIONS—*statute of repose for claims based on negligent design of highway*. Pursuant to section 13—214 of the Code of Civil Procedure, no action based on tort may be brought against any person for an act or omission in the design, planning, or construction of an improvement to real property after ten years have elapsed from the time of such act or omission, but any person who discovers such act or omission prior to expiration of the ten-year period shall have four years to bring an action.

SAME—*claims based on negligent design of highway were time-barred.* Two consolidated claims arising out of an automobile accident which alleged negligent design of a roadway were time-barred, since the accident occurred more than ten years after the State entered into a joint agreement with a city and a park district for redesign of the roadway in question.

EXHAUSTION OF REMEDIES—*Claimants failed to exhaust remedies—claims dismissed.* Section 25 of the Court of Claims Act requires Claimants to exhaust all other remedies, whether administrative, legal, or equitable, before seeking determination of a claim by the Court of Claims, and the Claimants, by voluntarily dismissing their circuit court action for negligent maintenance of a roadway against a municipality, failed to exhaust their remedies, and their claims were dismissed.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Respondent's, State of Illinois, motion to dismiss pursuant to section 2—619(a)(5) of the Code of Civil Procedure (735 ILCS 5/1-619(a)(5)) and section 790.90 of the Court of Claims' Regulations (74 Ill. Admin. Code 790), the matter having been fully briefed, and the Court being otherwise duly advised in premises:

The court finds Donna Scalafani and Hope D. Hughes were traveling southbound on North Lakeshore Drive in the city of Chicago on March 17, 1986. A vehicle in the northbound lanes allegedly crossed the center median, colliding with Claimants' vehicle. The Claimants were injured. Scalafani's injuries were fatal.

The Claimants, Hughes and Ocasek, each filed a cause of action on March 16, 1987 (for Hughes) and on

March 17, 1987 (Kahn, later substituted by Ocasek, for Scalafani). The Claimants claim that the State was negligent in its design and maintenance of the area of Lake Shore Drive on which the incident occurred.

The Respondent filed a motion to dismiss the Claimants' claims based upon the Claimants' failure to exhaust remedies. The roadway was subject to an agreement with the city of Chicago and the Respondent. The Claimants filed suit against the city in Circuit Court. This Court placed these matters on general continuance pending the Circuit Court's decision.

In their case against the city of Chicago, the Claimants asserted the identical theories of liability as asserted against the State, negligent design and negligent maintenance. The city of Chicago filed for summary judgment.

The Court granted summary judgment to the city as to the negligent design claim, based on the statute of repose barring Claimants' claims. The Court denied the city's summary judgment motion on the negligent maintenance issue.

The Claimants did not proceed to trial on the remaining negligence maintenance issue. Instead, the Claimants chose to voluntarily dismiss their negligent maintenance claims. With their voluntary dismissal making the summary judgment final, the Claimants chose to appeal the decision on the negligent design issue. See *Ocasek v. City of Chicago* (1995), 275 Ill. App. 3d 268, 656 N.E.2d 44, 211 Ill. Dec. 852.

The Circuit Court found that in 1966, the city of Chicago, the Chicago Park District, the County of Cook and the Respondent entered into an agreement to redesign Lake Shore Drive. The redesign included the location of the relevant automobile accident. (*Id.* at page 46.) The

Circuit Court found that IDOT had accepted the city's redesign on March 28, 1969. (*Id.* at page 47.) Thus, the statute of repose began running on the date of IDOT's acceptance. The effect was to bar the Claimants' claims. *Id.*

Discussion

The Respondent raises two arguments for the dismissal of these actions: the statute of repose bars the Claimants' claims against the Respondent and that the Claimants failed to exhaust their remedies against the city.

Claimants filed their negligent design claims in March of 1987. The subject portion of the roadway was redesigned as part of a joint agreement between the city of Chicago, the Chicago Park District, Cook County, and the Respondent. The Respondent accepted the redesign project on March 28, 1969.

Section 13—214 of the Code of Civil Procedure provides:

"§13—214. Construction—Design management and supervision.

Construction—Design management and supervision. As used in this Section 'person' means any individual, any business or legal entity, or any body politic.

(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or reasonably should have known of such act or omission.

(b) No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section. * * *."

The relevant automobile accident occurred more than ten years following the acceptance of the redesign project by the Respondent. Hence the Court holds that these claims are barred by the statute of repose.

Even if the statute of repose did not bar the Claimants' claims, we would still dismiss this matter based upon the Claimants' failure to exhaust all other remedies. Section 25 of the Court of Claims Act and section 790.60 of the Court of Claims Regulations require Claimants to exhaust all other remedies, whether administrative, legal or equitable, before seeking a determination of claim by the Court of Claims. (705 ILCS 505/25, 74 Ill. Admin. Code 790.60.) Failure to exhaust all other remedies shall be grounds for dismissal. (74 Ill. Admin. Code 790.60.) The Court of Claims has stated that the exhaustion requirement is not an option to be accepted or ignored by Claimants. It is mandatory. See *Lyons v. State* (1981), 34 Ill. Ct. Cl. 268, 271-72.

In the instant case, the Claimant had an alternative recovery source, namely the city of Chicago. The trial on the issue was ready to proceed. Instead of exhausting the remedy against the city of Chicago for its claim of negligent maintenance at trial, the Claimants abandoned their claim by voluntary dismissal. The Claimants made a choice not to exhaust their remedy against the city of Chicago. To allow an action to proceed where an alternative remedy exists but was abandoned on the brink of trial renders the exhaustion requirement meaningless. The exhaustion requirement cannot be circumvented by Claimants filing actions against alternative recovery sources and then abandoning the actions. The requirement of exhaustion means exactly what it states, namely that Claimants must exhaust their remedies. Failure to do so requires dismissal of these actions.

It is therefore ordered, adjudged, and decreed that these claims be, and they are hereby, dismissed and forever barred.

(No. 83-CC-0314—Claimant awarded $1,272.58.)

STATE FARM INS. CO., as Subrogee of EVANGELICAL CHILD & FAMILY AGENCY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed July 1, 1996.

GARRETSON & SANTORA, LTD., (RICHARD S. SPENCER, of counsel), for Claimant.

JIM RYAN, Attorney General (STEVEN SCHMALL, Assistant Attorney General, of counsel), for Respondent.

COLLATERAL ESTOPPEL AND RES JUDICATA—*subrogation claim—doctrine of res judicata did not apply—award granted.* In an insurer's subrogation claim seeking recovery of sums paid for damage to a woman's vehicle in an accident with a State truck, although the State had previously sued and recovered the amount of workers' compensation paid to the truck driver in a case that was settled by the parties with an agreed order of dismissal, the doctrine of *res judicata* did not apply to bar the insurer's subrogation claim, since the prior lawsuit was settled without benefit of a final court order or judgment and the stipulated order of dismissal was not a sufficient adjudication on the merits to bar further proceedings.

ORDER

PATCHETT, J.

This is a subrogation claim. State Farm insured a vehicle driven by Barbara Jean Hellmer which was involved in an accident with an Illinois Department of Transportation truck. The State had previously sued in Circuit Court to recover the amount of workers' compensation paid to their employee, the driver of the truck. This case was settled with the State receiving the amount sought. However, the settlement resulted in a dismissal of the action, not a judgment or court order.

State Farm now brings an action in the Court of Claims for recovery of the amount of money paid by it for damage to the vehicle driven by Mrs. Hellmer. It should be noted that State Farm originally brought a cause of action

in circuit court, but that was dismissed because of sovereign immunity.

A trial was held in this matter before a commissioner of this Court. Many objections were made as to the introduction of evidence regarding the other lawsuit. In addition, the attorney for the Respondent attempted to raise the issue of *res judicata* or *collateral estoppel.* However, because the prior lawsuit was settled without benefit of a final court order or judgment, the doctrines of *res judicata* and/or *collateral estoppel* do not apply. It appears that the prior matter was settled via an agreed or stipulated order of dismissal. This will prevent the Respondent from now arguing that it was a sufficient adjudication on the merits for the purposes of raising the doctrine of *res judicata*. It actually appears that there is a split of authority in Illinois cases as to whether a dismissal with prejudice pursuant to a settlement is sufficient to raise *res judicata*. *Caporale v. Shannon Plumbing Company, Inc.* (1974), 20 Ill. App. 3d 511, 314 N.E.2d 540, holds that where parties stipulate to dismiss a suit with prejudice as a matter of administrative convenience, they will be estopped from arguing that this was an adjudication on the merits. However, *Keim v. Kalbfleisch* (1978), 57 Ill. App. 3d 621, 373 N.E.2d 565, 15 Ill. Dec. 219, holds that if a court approves a settlement, it merges all included claims and causes of actions and is a bar to further proceedings. The case further holds that a dismissal with prejudice is as conclusive of rights of parties as if suit had been prosecuted to a final adjudication adverse to the plaintiffs.

From the apparent split of authority on this issue, we must apply the facts of this case. In this case, the Claimant filed a counterclaim in circuit court. That counterclaim was dismissed on the basis of sovereign immunity. Therefore, all prior claims and causes of action could not be

merged by virtue of the settlement and previous dismissal in circuit court. Therefore, we decline to apply the issue of *res judicata* in the present case. Because of that, we must decide this case based on the evidence presented.

Mrs. Hellmer testified at trial. The State presented no evidence. The Court has considered the departmental report which was submitted by the State. Based on the evidence presented, State Farm has met its burden of proof on the issue of liability. Damages are basically uncontested. Therefore, State Farm is awarded the sum of $1,272.58, the actual amount paid out by State Farm.

(No. 88-CC-1610—Claimant awarded $100,000.)

KAY E. HEFTI, Administratrix of the Estate of TROI P. HEFTI, deceased, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed May 7, 1996.

Opinion as modified on rehearing filed June 30, 1997.

HAMM & HANNA (TRACY C. LITZINGER, of counsel), for Claimant.

JIM RYAN, Attorney General (TERENCE J. CORRIGAN, Assistant attorney General, of counsel), for Respondent.

HOSPITALS AND INSTITUTIONS—*duty owed to State wards and patients.* The State owes its wards and hospital patients the duty of protection and reasonable care, and this duty of care must take account of the patient's known condition and may include safeguarding a patient from dangers due to mental or physical incapacities that are known to the State, or that, by exercise of reasonable care, ought to be known by the State.

SAME—*elements of recovery in negligence claim—damages available in wrongful death suit.* In a negligence claim, the elements of recovery are the breach of a duty of care, consequential injury resulting proximately from the breach, and damages, and in a wrongful death suit, the damages recoverable include statutorily allowed pecuniary damages for loss of present and future support for those dependent on the decedent, as well as loss of society and consortium.

SAME—*wrongful death claim arising out of 17-year-old patient's suicide—State liable for custodial negligence.* The mother of a 17-year-old boy who committed suicide by hanging himself in the shower of a State mental health facility where he was a patient prevailed in her custodial negligence claim as administratrix of the boy's estate, and the State was liable to the boy's family for damages for loss of society, since despite knowledge of the boy's suicidal and self-abusive tendencies, State employees failed to adequately supervise the boy in the shower area and gave him access to the bandanna and shower hook which he used to hang himself.

SAME—*State failed to comply with procedural requirements of Mental Health Code—counterclaim for cost of services dismissed.* In the State's counterclaim against a mother for the cost of services rendered to her 17-year-old son who committed suicide in a State mental health facility, the State's failure to issue a notice of determination as required by section 5—111 of the Mental Health Code resulted in dismissal of the counterclaim.

OPINION

EPSTEIN, J.

This is a wrongful death claim brought by the administratrix of the decedent's estate, his mother, alleging negligence by the Department of Mental Health and Developmental Disabilities (DMHDD) at its Zeller Mental Health Center which allegedly caused or negligently permitted the suicide of the decedent, Troi Hefti, a 17-year-old patient at the time of his death on June 24, 1987.

This cause is before us for final ruling, following a trial before our former commissioner, Richard H. Parsons, on May 19, 1993. Commissioner Parsons' report and recommendations were submitted to us, as was the trial transcript. This opinion follows our own detailed and lengthy review of this said and very difficult record.

Summary of the Claim

Claimant Kay Hefti brought this claim in 1988 in her capacity as the administratrix of the estate of Troi Hefti. Essentially, the allegations are that Troi Hefti was an extremely troubled boy from an early age who had been physically self-abusive for a long time and had been repeatedly

diagnosed as such and as seriously dangerous to himself, and had long been in State DMHDD facilities where his behavior and diagnosis were well known. Claimant advances two theories of DMHDD negligent culpability for Troi Hefti's suicide: (1) the actions of a DMHDD physician who without any reasonable basis unilaterally ordered the cessation of the 15-minute suicide watch on Troi, on the day of his suicide; and (2) the oversight of DMHDD staff in leaving a hanging instrument openly available to Troi in the shower of his facility, where he obtained it and hung himself.

The State, for its part, filed a counterclaim seeking reimbursement for its expenses of caring for Troi Hefti, pursuant to the provisions of the Mental Health Code. This counterclaim is sought, essentially, as an offset against any award that might result.

The Facts

On June 24, 1987, Troi Hefti was a resident and patient in the George A. Zeller Mental Health Center ("Zeller") when he was found hanging in a bathroom at approximately 6:15 p.m. on that day. The underlying facts are sad and not seriously controverted.

Troi Hefti was born February 16, 1970, and began having behavioral problems at about age five. He was first institutionalized at age 11. He had been in various institutions over the last six or seven years of his life. His history showed extreme and bizarre self-abusive behavior which regularly resulted in serious and permanent injuries. Troi was a problem child and a problem patient. He was a frequent resident of Zeller in particular, where his self-abusive behavior and suicide threats were well known. Ultimately, that pattern of behavior resulted in his death.

Troi was last admitted to Zeller on August 20, 1986, ten months before his death; he had been a patient at

Zeller on five previous occasions. His typical modus operandi was to tell anyone anything in order to get his own way. He was adamantly opposed to discipline and to reductions of his privileges. The trial evidence, particularly the testimony of several professionals, showed clearly that the staff at Zeller knew of Troi's self-abusive behavior and occasional suicide threats.

On the day of Troi's death, the physician in charge (the "staff physician") of the children's adolescent unit at Zeller, in which Troi was resident, was Dr. James L. Weiler who was filling in for Dr. Marcia Aranas. Dr. Weiler was somewhat familiar with Troi's behavior history and some of his prior episodes.

Dr. Weiler knew that Troi had threatened to kill himself (by putting a necktie around his neck) on December 22, 1986. Dr. Weiler knew that Troi had frequent outbursts of aggression in March 1987, and was unable to handle his anger and frustration, and was also aware that in May 1987, Troi was so frustrated and upset over his mother having removed his clothes (in order to discourage his frequent breakouts or "elopements") that he became self-abusive, suicidal and threatened to kill himself and others. Dr. Weiler recalled that on one occasion Troi grabbed a pair of sewing scissors and threatened to gouge his own eyes out. He also knew that after Troi's elopement from and return to Zeller, Troi had stated that he would not hesitate to do bodily harm to himself if "pushed to the limit."

Dr. Weiler did not recall that Troi told his mother that he was going to do something to himself several days before the suicide. Director Roland Chambers testified that Dr. Weiler and he talked to Troi about the statement Troi had made that he was going to kill himself and at that time Troi said that he was not suicidal.

Approximately one week before Troi's death, he told his mother he was considering suicide. She was deeply concerned and believed her son. She discussed this with the staff personnel and the director of the unit at Zeller. She strongly disagreed with Mr. Chamber's opinion that Troi was just trying to get attention and that the behavior just needed to be ignored.

Roland Chambers, director of the unit, testified that he knew Troi had, in fact, injured himself intentionally on more than one occasion. He was aware that Troi had jumped out of a moving vehicle that resulted in the amputation of his arm below the elbow. Mr. Chambers also was informed about the time Troi hung from a third-story window and the time when Troi purposely slammed his fingers in a door to cause injury. He knew about the incident where Troi threatened to gouge out his eyeball with scissors and the time when Troi slammed his fist into the wall. He acknowledged that Troi had been on the status of SOS (suicidal precautions) in the past at Zeller. A week before Troi's death, Mr. Chambers was made aware that Troi stated to several people that he was going to kill himself. This was also entered in Troi's chart.

Nevertheless, on the date of Troi's death, Dr. Weiler ordered a discontinuation of the 15-minute suicide checks on Troi.

The charge nurse, Delaine Gamble, was acquainted with the threats Troi made to harm himself and was aware of the various times Troi did harm himself. She testified that he previously injured himself four or five times. She knew that Troi had said he would be out of there one way or the other several days before he committed suicide. She stated that all threats had to be put on his chart. She recalls that Troi was on suicide precaution a couple of times in the past.

Mary Grimes, a registered nurse on the unit, was asked to transfer to this unit because three other nurses were absent. She also knew about the previous times Troi had injured himself. She had heard from other staff that Troi threatened to take his life a few days before he actually committed suicide. She knew that Troi had been taken off the 15-minute checks. However, she testified that she and charge nurse Gamble did not agree with that decision, that they kept a regular watch on Troi despite the order and that they tried to know where Troi was at all times because they knew of his elopement and suicide threats.

Nathan Dixon, a mental health technician on the unit, knew of Troi's self-inflicted injuries and of the recent threat of suicide. He testified that on each occasion that Troi threatened to elope or eloped, when he returned he would state he was not going to do that again which was also his behavior after each occasion that Troi injured himself.

On the day of Troi's death, he was able to go unattended into the showers in his unit at Zeller, where bandannas and shower hooks were provided by the DMHDD, and which Troi Hefti used, finally, to make good on his threats of suicide.

Analysis

1. The Law of the Claim

The State and its agencies, including the DMHDD, owe their wards and patients the duty of protection and reasonable care. These duties of care must take account of the patient's known condition, and may include safeguarding a patient from dangers due to mental or physical incapacities that are known to the State, or that by the exercise of reasonable care ought to be known by the State.

However, as our opinions constantly emphasize, the State is not an insurer of the safety of the patients under the care of its agencies, including DMHDD. *Reynolds v. State* (1983), 35 Ill. Ct. Cl. 647, 649.

As in any suit predicated on negligence, the elements of recovery are the breach of a duty of care, consequential injury resulting proximately from the breach, and damages. In a wrongful death suit, the damages recoverable include the statutorily allowed pecuniary damages for loss of present and future support for those dependent on the decedent (740 ILCS 180/2), as well as loss of society and consortium, but not in the case of deceased children subject to deduction of child-rearing expenses, but recovery is not allowed for mental anguish of the survivors. *Bullard v. Barnes* (1984), 102 Ill. 2d 505, 486 N.E.2d 1228; *Drews v. Global Freight Lines, Inc.* (1991), 144 Ill. 2d 84, 578 N.E.2d 970; *Holston v. Sisters of the Third Order* (1991), 247 Ill. App. 3d 985, 618 N.E.2d 334.

2. The Liability Issue

This record is replete with evidence of repeated serious self-abuse and ongoing suicide threats by Troi Hefti, all of which were well known to the Zeller staff of the DMHDD. It is clear to this court, after review of this record, that the DMHDD staff at the Zeller Center were negligent in both of the key respects alleged.

First, Dr. Weiler's order striking the standing 15-minute checks on Troi was as culpable and irresponsible a medical action as this court has seen in a long time. No basis was shown that might possibly have warranted that decision at the time, based on what Dr. Weiler actually knew and what he should have known from the records and the consensus of his staff. The record provides no basis, after the fact, that might justify that decision.

However, as negligent and almost cavalier we find that decision to have been, we cannot and will not find liability on the basis of Dr. Weiler's negligence. This is because of the testimony of the Zeller staff on Troi's unit that they essentially ignored Dr. Weiler's removal of the 15-minute checks on Troi. These staffers, more sensible by far than their medical supervisor, tried their best on a difficult service and although sadly that was not enough to prevent Troi's suicide, their efforts break any possible chain of causation between Dr. Weiler's order and the death of Troi Hefti. Thus, this act of negligence cannot be a proximate cause of Troi's suicide.

On the other hand, the failure of the DMHDD to prevent access to potential and fairly obvious suicide devices, and to leave such materials in a readily accessible place on the unit which is frequented by a known suicidal patient in a mental facility is another matter altogether. While we do not doubt for a minute, based on this record, that the Zeller staff tried to patrol the area, it is clear that those efforts were not adequate. We are persuaded in good measure because of the location and frequency of access of the suicide location. It was a failure of due care not to patrol the shower area constantly, as hanging in showers is a known and unfortunately well established suicide technique in institutions. But for Troi's access to the bandanna in or proximate to the shower area, he could not have killed himself that day by any other means that have been shown to be available to him at the Zeller unit.

Respondent's argument that the decedent was not labeled "suicidal" at the time of his death is unpersuasive and almost an admission of negligence in light of the overwhelming evidence in this record. This court is sensitive to the ease with which after-the-fact reviews by courts and other laypeople can second guess medical professionals

whose knowledge and perspective at the time, and under trying and pressured circumstances, is very different and whose decisions and actions must take place in a very different context than our more leisurely review. However, this is not a difficult case in terms of the key personnel's knowledge and professional understandings at the time. If Troi Hefti was not diagnosed or labeled suicidal on the day of his death, someone blew it very badly.

Moreover, by DMHDD's own standards, something was wrong, as its treatment plans specify that patients be placed in "suicidal status" for any attempts at self-abuse, which had occurred with this patient on multiple occasions and was well known.

Respondent contends that the Claimant must produce expert testimony to be successful in her claim of medical or professional negligence. Although that may be the general rule for reviewing technical competence of professionals, expert testimony is not required if the negligence is so readily apparent or the treatment is of such a common occurrence that a layman would have no difficulty appraising it. (*Dimitrijeic v. Chicago Wesley Memorial Hospital* (1968), 93 Ill. App. 2d 251, 236 N.E.2d 309.) There is more than adequate basis in this record for us to find negligence, as we do.

It must be clarified that the claim here is *not* that DMHDD was negligent in failing to diagnose or to affirmatively designate the deceased as a suicidal risk. Instead, the claim here is predicated on the decedent's death being the proximate result of the State's failure to provide supervision and its actual provision of the means of suicide, in light of DMHDD's extensive knowledge of this patient and lengthy experience with his actual behavior and threats. Provisions of bandannas and shower hooks to a known self abuser who repeatedly threatens

suicide is—at a minimum—a failure to exercise due care for that patient's safety.

Our commissioner has specifically found that this patient (and the unit) was not supervised or patrolled closely enough under the circumstances to comport with reasonable standards of care. From our more distanced review of this record, we agree with his conclusion. Nothing argued by the Respondent comes close to persuading us otherwise. The DMHDD did not use due care in protecting Troi Hefti from harming himself and from committing suicide. As a proximate result of this negligence, Troi killed himself.

This case is factually distinguishable, and simply different, from the cases on which the Respondent relies to avoid liability. The gross evidence of self abuse in this case distinguishes it from *Dimitrijevic, supra*, and other cases cited by the Respondent. In *Reynolds v. State* (1983), 35 Ill. Ct. Cl. 647, 549, another suicide case, the deceased was known to attempt escape, but was not known to be abusive or suicidal beforehand; escape tendencies or escape behavior do not indicate or suggest suicide.

Similarly, while John Britton was known to be in constant trouble, and to engage in loud talking, fighting and rebelling against institutional rules, that behavior was not enough to put the State on notice of possible suicide. (*Woods v. State* (1985), 38 Ill. Ct. Cl. 9, 24.) *Woods* bears no similarity to this case.

In the suicide of Jerry Gianos, Dr. Visotsky, an honored former director of the department, testified that, "A patient's telling you that he is going to commit suicide in no uncertain terms is also a higher indicator of risk." In that case, however, the evidence showed that Jerry Gianos

never spoke of suicide to anyone. Dr. Bayardo interviewed him and noted that he did not see any evidence in his behavior that he might hurt himself or others. (*Gianos v. State* (1975), 30 Ill. Ct. Cl. 373, 376.) *Gianos*, to the extent relevant here, supports liability as it enhances the duty of care owed.

In this case, Troi Hefti's mind was not merely unstable, nor did he simply threaten elopement as were the facts in the cases cited by Respondent. In this case, it is clear he was actively self-abusive and openly threatened suicide. With this knowledge, the State should not have provided or allowed a bandanna anywhere near Troi nor anywhere accessible to Troi. Without very close supervision, a self-abusive, mentally unstable individual who recently threatened suicide is a high-risk patient. The evidence here showed that Troi was obviously and visibly upset on the day of his suicide with denial of privileges immediately beforehand. In these circumstances, the State's efforts fell short.

3. The State's Counterclaim

On November 8, 1991, the Respondent asked for leave to file a counter-complaint for services rendered and paid. Claimant maintains that consideration of a set-off is improper because the State failed to plead and prove demand, proper itemization, and proof as required by the Mental Health Code. This argument, and Respondent's argument that Claimant failed to exhaust her administrative remedies, need not be considered.

The counterclaim for services of the DMHDD is brought pursuant to the Mental Health Code, which *inter alia* provides "Except that no responsible relative may be held liable for charges for services furnished to a recipient if such charges were assessed more than 5 years prior to the time the action is filed." This requires the counter-complaint

offset be dismissed as barred as to services accruing more than five years prior to November 8, 1991. Formerly Ill. Rev. Stat., Ch. 91½, par. 5—113; *see* 405 ILCS 5/5—113 (1994).

In addition, under the Wrongful Death Act, recovery is for the sole benefit of the next of kin for the pecuniary loss (and loss of society) sustained by the death of the relative. (*See, e.g., Ohnesorge v. Chicago City Railway Co.* (1913, 259 Ill. 424, 102 N.E. 819, 821.) The Wrongful Death Act further provides that the person furnishing hospitalization in connection with the decedent's last injury or illness can receive a reimbursement *only* where the deceased person left no surviving spouse or next of kin. (740 ILCS 180/2.) Even assuming that DMHDD might somehow qualify here as having provided hospitalization, the Claimant's survival of the decedent here precludes any payment to DMHDD.

4. The Award

Claimant does not contend that she or the family were, or were likely to be, financially dependent on Troi Hefti for support. The court cannot entertain a pecuniary damages award in this case.

On the other hand, Troi Hefti left behind a loving family of siblings, as well as his mother, the Claimant-administratrix whose recovery must compensate for all their loss. Loss of society is difficult to measure and even more difficult to compensate. The record in this case, however, shows that as difficult a child as Troi Hefti was, he was close to his siblings as well as to his mother, all of whom maintained a genuine and seemingly close relationship with him and regularly visited him, despite his overt self-destructive behavior. Indeed, this record reflects a remarkably close family under extraordinarily difficult circumstances.

After reviewing this record and considering wrongful death awards by this and other Illinois courts, we conclude that the award of $100,000 should be granted to the decedent's estate for equal distribution to the surviving siblings and mother of the decedent.

Conclusion and Order

For the foregoing reason, we find for the Claimant's negligence claim for the wrongful death of the decedent, and enter judgment for the Claimant and against the Respondent. The Respondent's counter claim is dismissed.

It is ordered: Claimant Kay E. Hefti, Administratrix of the Estate of Troi P. Hefti, Deceased, is awarded the sum of $100,000 in full and complete compensation for the wrongful death of Troi Hefti for his estate and his heirs.

OPINION AS MODIFIED ON REHEARING

EPSTEIN, J.

This is a wrongful death claim brought by the Administratrix of the decedent's estate, his mother, alleging negligence by the Department of Mental Health and Developmental Disabilities ("DMHDD") at its Zeller Mental Health Center which allegedly caused or negligently permitted the suicide of the decedent, Troi Hefti, a 17-year-old patient at the time of his death on June 24, 1987.

This cause is before us for final ruling, following a trial before our former commissioner, Richard H. Parsons, on May 19, 1993. Commissioner Parsons' report and recommendations were submitted to us, as was the trial transcript. This opinion follows our own detailed and lengthy review of this sad and very difficult record.

Summary of the Claim

Claimant Kay Hefti brought this claim in 1988 in her capacity as the administratrix of the Estate of Troi Hefti.

Essentially, the allegations are that Troi Hefti was an extremely troubled boy from an early age who had been physically self-abusive for a long time and had been repeatedly diagnosed as such and as seriously dangerous to himself, and had long been in State DMHDD facilities where his behavior and diagnosis were well known. Claimant advances two theories of DMHDD negligent culpability for Troi Hefti's suicide: (1) the actions of a DMHDD physician who without any reasonable basis unilaterally ordered the cessation of the 15-minute suicide watch on Troi, on the day of his suicide; and (2) the oversight of DMHDD staff in leaving a hanging instrument openly available to Troi in the shower of his facility, where he obtained it and hung himself.

The State, for its part, filed a counterclaim seeking reimbursement for its expenses of caring for Troi Hefti, pursuant to the provisions of the Mental Health Code. This counterclaim is sought, essentially, as an offset against any award that might result.

The Facts

On June 24, 1987, Troi Hefti was a resident and patient in the George A. Zeller Mental Health Center ("Zeller") when he was found hanging in a bathroom at approximately 6:15 p.m. on that day. The underlying facts are sad and not seriously controverted.

Troi Hefti was born February 16, 1970, and began having behavioral problems at about age five. He was first institutionalized at age 11. He had been in various institutions over the last six or seven years of his life. His history showed extreme and bizarre self-abusive behavior which regularly resulted in serious and permanent injuries. Troi was a problem child and a problem patient. He was a frequent resident of Zeller in particular, where his self-abusive behavior and suicide threats were well known. Ultimately, that pattern of behavior resulted in his death.

Troi was last admitted to Zeller on August 20, 1986, ten months before his death. He had been a patient at Zeller on five prior occasions. His typical modus operandi was to say anything to get his own way. He was adamantly opposed to discipline and to reduction of his privileges. The trial evidence, particularly the testimony of the professionals, showed clearly that the staff at Zeller knew of Troi's self-abusive behavior and occasional suicide threats.

On the day of Troi's death, the physician in charge (the staff physician) of the children's adolescent unit at Zeller, in which Troi was resident, was Dr. James L. Weiler who was filling in for Dr. Marcia Aranas. Dr. Weiler was somewhat familiar with Troi's behavior history and some of his prior episodes.

Dr. Weiler knew that Troi had threatened to kill himself (by putting a necktie around his neck) in December, 1986, and that Troi had frequent outbursts of aggression and was unable to handle his anger and frustration. He was also aware that in May 1987, Troi was so frustrated and upset over his mother having removed his clothes (to discourage his frequent breakouts or "elopements") that he became self-abusive, and threatened to kill himself and others. Dr. Weiler recalled that on one occasion Troi grabbed a pair of sewing scissors and threatened to gouge his own eyes out. He also knew that after Troi's elopement from and return to Zeller, Troi had stated that he would not hesitate to do bodily harm to himself if "pushed to the limit."

Dr. Weiler did not recall that Troi told his mother that he was going to do something to himself several days before the suicide. Director Roland Chambers testified that Dr. Weiler and he talked to Troi about the statement Troi had made that he was going to kill himself and at that time Troi said that he was not suicidal.

Approximately one week before Troi's death, he told his mother he was considering suicide. She was deeply concerned and believed her son. She discussed this with the staff personnel and the director of the unit at Zeller. She strongly disagreed with Mr. Chamber's opinion that Troi was just trying to get attention and that the behavior just needed to be ignored.

Roland Chambers, director of the unit, testified that he knew Troi had, in fact, injured himself intentionally on more than one occasion. He was aware that Troi had jumped out of a moving vehicle that resulted in the amputation of his arm below the elbow. Mr. Chambers also was informed about the time Troi hung from a third-story window and the time when Troi purposely slammed his fingers in a door to cause injury. He knew about the incident where Troi threatened to gouge out his eyeball with scissors and the time when Troi slammed his fist into the wall. He acknowledged that Troi had been on the status of SOS (suicidal precautions) in the past at Zeller. A week before Troi's death, Mr. Chambers was made aware that Troi stated to several people that he was going to kill himself. This was also entered in Troi's chart.

Nevertheless, on the date of Troi's death, Dr. Weiler ordered a discontinuation of the 15-minute suicide checks on Troi.

The charge nurse, Delaine Gamble, was acquainted with the threats Troi made to harm himself and was aware of the various times Troi did harm himself. She testified that he previously injured himself four or five times. She knew that Troi had said he would be out of there one way or the other several days before he committed suicide. She stated that all threats had to be put on his chart. She recalls that Troi had been on suicide precaution several times in the past.

Mary Grimes, a registered nurse on the unit, was asked to transfer to this unit because three other nurses were absent. She also knew about the previous times Troi had injured himself. She had heard from other staff that Troi threatened to take his life a few days before he actually committed suicide. She knew that Troi had been taken off the 15-minute checks. However, she testified that she and charge nurse Gamble did not agree with that decision, that they kept a regular watch on Troi despite the order and that they tried to know where Troi was at all times because they knew of his elopement and suicide threats.

Nathan Dixon, a mental health technician on the unit, knew of Troi's self-inflicted injuries and of the recent threat of suicide. He testified that on each occasion that Troi threatened to elope or eloped, when he returned he would state he was not going to do that again which was also his behavior after each occasion that Troi injured himself.

On the day of Troi's death, he was able to go unattended into the showers in his unit at Zeller, where bandannas and shower hooks were provided by the DMHDD, and which Troi Hefti used, finally, to make good on his threats of suicide.

Analysis

1. The Law of the Claim

The State and its agencies, including the DMHDD, owe their wards and patients the duty of protection and reasonable care. These duties of care must take account of the patient's known condition, and may include safeguarding a patient from dangers due to mental or physical incapacities that are known to the State, or that by the exercise of reasonable care ought to be known by the State.

However, as our opinions constantly emphasize, the State is not an insurer of the safety of the patients under the care of its agencies, including DMHDD. *Reynolds v. State* (1983), 35 Ill. Ct. Cl. 647, 649.

As in any suit predicated on negligence, the elements of recovery are the breach of a duty of care, consequential injury resulting proximately from the breach, and damages. In a wrongful death suit, the damages recoverable include the statutorily allowed pecuniary damages for loss of present and future support for those dependent on the decedent (740 ILCS 180/2), as well as loss of society and consortium, but not in the case of deceased children subject to deduction of child-rearing expenses, but recovery is not allowed for mental anguish of the survivors. *Bullard v. Barnes* (1984), 102 Ill. 2d 505, 486 N.E.2d 1228; *Drews v. Global Freight Lines, Inc.* (1991), 144 Ill. 2d 84, 578 N.E.2d 970; *Holston v. Sisters of the Third Order* (1991), 247 Ill. App. 3d 985, 618 N.E.2d 334.

2. The Liability Issue

The record is replete with evidence of repeated serious self-abuse and ongoing suicide threats by Troi Hefti, all of which were well known to the Zeller staff of the DMHDD. It is clear to this court, after review of this record, that the DMHDD staff at the Zeller Center were negligent.

The record provides no basis, either at the time or after the fact, for Dr. Weiler's order discontinuing the 15-minute checks on Troi. However, as incorrect and seemingly cavalier as that decision proved to have been, we cannot and will not find liability on the basis of that order. This is because of the clear and undisputed testimony of the Zeller staff on Troi's unit that they essentially ignored Dr. Weiler's removal of the 15-minute checks on Troi. These sensible and dedicated staffers tried their best on a

difficult service. Although sadly that was not enough to prevent Troi's suicide, their efforts break any possible chain of causation between Dr. Weiler's order and the death of Troi Hefti. Thus this act, even if negligent, could not be a proximate cause of Troi's suicide.

On the other hand, the failure of the DMHDD to prevent access to potential and fairly obvious suicide devices, and to leave such materials in a readily accessible place on the unit which is frequented by a known self-destructive—and suicide-threatening—patient in a mental facility is another matter altogether. While we do not doubt for a minute, based on this record, that the Zeller staff tried to patrol the area, it is clear that those efforts were inadequate in an environment that was not rigorously scrubbed of self-destructive implements. We are also persuaded in part by the location and frequency of access of the suicide location. It was a failure of due custodial care not to patrol the shower area constantly: hanging in showers is a known and unfortunately well established suicide technique in institutions. But for Troi's access to the bandanna in or proximate to the shower area, he could not have killed himself that day by any other means that have been shown to be available to him at the Zeller unit.

Respondent's argument that the decedent was not labeled "suicidal" or formally diagnosed as such at the time of his death is unpersuasive, and almost irrelevant. This claim does not turn on the foreseeability of suicide. The foreseeability of serious self-abusive conduct by Troi Hefti is the point. And that was manifestly and undisputedly foreseeable. (Indeed, on this record, anyone on the staff at Zeller who might claim not to have foreseen the likelihood of Troi Hefti engaging in further self-abuse could do so credibly only if they were unfamiliar with his history,

which hopefully did not include anyone responsible for his custody or care.) Of course, self-abuse may or may not result in death. But that is hardly a defense in this case. The kind of serious abuse that young Mr. Hefti had repeatedly engaged in was capable of causing death, but that too is largely irrelevant. The overwhelming evidence in this record shows that the responsible staff at Zeller knew that Troi Hefti was a serious physical danger to himself; the degree of likely harm is simply not the point.

This court is sensitive to the ease with which after-the-fact reviews by courts and other laypeople can second guess medical professionals whose knowledge and perspective at the time, and under trying and pressured circumstances, is very different and whose decisions and actions must take place in a very different context than our more leisurely review. However, this is not a difficult case, and this is not a case that involves review of medical or diagnostic judgments. In terms of the key personnel's knowledge and professional understandings at the time, it is clear that Troi Hefti—even if, *arguendo*, he was correctly undiagnosed as suicidal on the day of his death—was nonetheless known to be a serious and substantial danger to himself. That is enough to require custodial scrutiny that was lacking here.

Moreover, by DMHDD's own standards, something was wrong with the Zeller staff's classification of Troi Hefti, as its treatment plans specify that patients be placed in "suicidal status" for any attempts at self-abuse, which had occurred with this patient on multiple occasions and was well known.

Respondent contends that the claimant must produce expert testimony to be successful in a claim of medical or professional negligence. That is the general rule for reviewing technical competence of medical professionals.

As we stated above, this is not a professional malpractice claim. Expert testimony is not required for a second reason. Where the negligence is so readily apparent or the treatment is of such a common occurrence that a layman would have no difficulty appraising it, expert testimony is not critical. (*Dimitrijeic v. Chicago Wesley Memorial Hospital* (1968), 93 Ill. App. 2d 251, 236 N.E.2d 309.) There is more than adequate basis in this record for us to find clear and obvious negligence, as we do.

Given the contentions of the Respondent on rehearing, we must emphasize again that the claim here is *not* that DMHDD was negligent in failing to diagnose or to affirmatively designate the deceased as a suicidal risk or in its medical treatment of the decedent. Instead, the claim here is predicated on the decedent's death being the proximate result of the State's failure to provide supervision and its actual provision or negligent tolerance of the means of suicide, in light of DMHDD's extensive knowledge of this patient and his actual behavior and threats. We view this as an extreme, and hopefully singular case. Provisions of bandannas and shower hooks to a known self-abuser who repeatedly threatens suicide is—at a minimum—failure to exercise due care for that patient's safety.

From our view of the record we conclude that the decedent was not supervised or patrolled closely enough under the circumstances to comport with reasonable standards of care. Nothing argued by the respondent comes close to persuading us otherwise. The DMHDD did not use due care in protecting Troi Hefti from harming himself and from committing suicide. As a proximate result of this negligence, Troi killed himself.

This case is factually distinguishable, and simply different, from the cases on which the respondent relies to avoid liability. The gross evidence of self-abuse in this case

distinguishes it from *Dimitrijevic, supra*, and other cases cited by the respondent. In *Reynolds v. State* (1983), 35 Ill. Ct. Cl. 647, 549, another suicide case, the deceased was known to attempt escape, but was not known to be abusive or suicidal beforehand; escape tendencies or escape behavior does not indicate or suggest suicide.

Similarly, while John Britton was known to be in constant trouble, and to engage in loud talking, fighting and rebelling against institutional rules, that behavior was not enough to put the State on notice of possible suicide. (*Woods v. State* (1985), 38 Ill. Ct. Cl. 9, 24.) *Woods* bears no similarity to this case.

In the suicide of Jerry Gianos, Dr. Visotsky, an honored former Director of the Department, testified that "A patient's telling you that he is going to commit suicide in no uncertain terms is also a higher indicator of risk." In that case, however, the evidence showed that Jerry Gianos never spoke of suicide to anyone. Dr. Bayardo interviewed him and noted that he did not see any evidence in his behavior that might hurt himself or others. (*Gianos v. State* (1975), 30 Ill. Ct. Cl. 373, 376.) *Gianos*, to the extent relevant here, supports liability as it enhances the duty of care owed.

In this case, Troi Hefti's mind was not merely unstable, nor did he simply threaten elopement as were the facts in the cases cited by respondent. In this case, it is clear he was actively self-abusive and openly threatened suicide. With this knowledge, the State should not have provided or allowed a bandanna anywhere near Troi nor anywhere accessible to Troi. Without very close supervision, a self-abusive, mentally unstable individual who recently threatened suicide is a high-risk patient. The evidence here showed that Troi was obviously and visibly upset on the day of his suicide with denial of privileges

immediately beforehand. In these circumstances, the State's efforts fell short.

3. The Award

Claimant does not contend that she or the family were, or were likely to be, financially dependent on Troi Hefti for support. There can be no pecuniary damages award in this case.

On the other hand, Troi Hefti left a family of siblings, as well as his mother, the Claimant-administratrix whose recovery must compensate all for their loss. Loss of society is difficult to measure and even more difficult to compensate. The record in this case, however, shows that as difficult a child as Troi Hefti was, he was close to his siblings as well as to his mother, all of whom maintained a close relationship with him and regularly visited him, despite his overt self-destructive behavior. This record reflects a close family under difficult circumstances.

After reviewing this record, and considering wrongful death awards by this and other Illinois courts, we conclude that the award of $100,000 should be granted to the decedent's estate for equal distribution to the surviving siblings and mother of the decedent.

4. The State's Counterclaim

On November 8, 1991, the Respondent asked for leave to file a counter-complaint for services rendered by DMHDD to Troi Hefti in the amount of $52,326.60. The procedural disposition of this counterclaim by our commissioner is not altogether clear, but both sides have treated the counterclaim as filed and have vigorously pursued their positions on this aspect of the case. The Court treats the counterclaim as filed and before us for adjudication.

The DMHDD's counterclaim is for the costs of its services to the late Troi Hefti, and is brought pursuant to

sections 5—105 through 5—116 of the Mental Health Code (now 405 ILCS 5/5—105 through 5/5—116) (the MHC), which *inter alia* provides in material part:

"§5—105. Each recipient of services provided * * * by the Department and the estate of that recipient is liable for the payment of sums representing charges for services to the recipient at a rate to be determined * * * in accordance with this Act. * * * If * * * the estate of the recipient is insufficient, the responsible relatives are severally liable for the payment of those sums or for the balance due * * *. If the recipient is under the age of 18, the recipient and responsible relative shall be liable for medical costs on a case-by-case basis for services for the diagnosis and treatment of conditions other than that child's handicapping condition. The liability shall be the lesser of the cost of medical care of the amount of responsible relative liability established by the Department under Section 5—116. * * * the maximum service charges for each recipient assessed against responsible relatives collectively may not exceed financial liability determined from income in accordance with Section 5—116. * * *.

§5—111. Any person who has been issued a Notice of Determination of sums due as service charges may petition the Department for a review of that determination. The petition must be * * * filed * * * within 90 days * * *. The Department shall provide for a hearing * * * shall take testimony and preserve a record of all proceedings * * *. Any person aggrieved by the decision * * * may within 30 days thereafter, filed a petition * * * for review of such decision by the Board of Reimbursement Appeals. * * *.

§5—113. Upon receiving a petition for review under Section 5—111, the Department shall * * * notify the Board of Reimbursement Appeals which shall renders its decision * * * within 30 days * * * and certify such decision to the Department * * *. Upon request of the Department, the State's Attorney of the county in which a responsible relative or a recipient who is liable under this Act for payment of * * * service charges resides, shall institute appropriate legal action against any such responsible relative, or the recipient or within the time provided by law shall file a claim against the estate of such recipient who fails or refuses to pay those charges. The court shall order the payment of sums due for services charged for such period or periods of time as the circumstances require, expect that no responsible relative may be held liable for charges for services furnished to a recipient if such charges were assessed more than 5 years prior to the time the action is filed; but such 5 year limitation does not apply to the liability of a recipient or recipient's estate. * * *."

In its initial arguments, the Claimant maintained that consideration of a set-off for "service charges" of the DMHDD is improper because the State failed to plead and prove demand or "assessment," proper itemization, and proof as required by section 5—105 and section 5—111 of the Mental Health Code. Claimant also contends that the 5-year limitation provision in section 5—113 of

the Mental Health Code bars this counterclaim. Finally, Claimant urges that the Wrongful Death Act does not allow recovery proceeds to be paid to the DMHDD as a health care provider (creditor) of the decedent, on the theory that the only hospitalization expenses that can be claimed from wrongful death recoveries are those of the decedent's last illness, which are not involved here.

In its initial arguments, the Respondent argued that Claimant failed to exhaust her administrative remedies as to the details of the DMHDD expense counterclaim, and disputed all of the Claimant's arguments. With respect to the 5-year limitation period of section 5—113, the Respondent urged that the relation-back provision of section 3—207 of the Code of Civil Procedure (735 ILCS 5/13—207) applies to the counterclaim and relates it back either to the date of the filing of the complaint in this case, or to the date of Troi Hefti's claim (on the theory that the claim against the Estate, as well as the Wrongful Death Act claim against the DMHDD accrued on that date).

In our initial, vacated decision, we dismissed the counterclaim. On the Respondent's petition, we granted rehearing on this issue, and heard oral argument and accepted supplemental briefs. In light of the initial arguments and the additional arguments advanced on rehearing, we must address the construction and application of the Mental Health Code, the Wrongful Death Act, and our own Court of Claims Act to the instant facts. Surprisingly, these seem mostly to be questions of first impression.

The first issue is whether any claim lies for DMHDD to recover the proceeds of the award in the Claimant's wrongful death action, which is said to be the sole asset of the Claimant estate against which recovery is sought by the counterclaim.

Under the Wrongful Death Act, recovery is for the sole benefit of the next of kin for the pecuniary loss and loss of society sustained by the death of the relative, and is generally not subject to the decedent's creditor's claims. (*See, e.g., Ohnesorge v. Chicago City Ry. Co.* (1913), 259 111.424, 102 N.E. 819, 821; *Greenock v. Merkel* (1979), 71 Ill. App. 3d 958, 390 N.E.2d 78.) The Wrongful Death Act further provides that the person furnishing hospitalization in connection with the decedent's last injury or illness can receive reimbursement only where the deceased person left no surviving spouse or next of kin (740 ILCS 180/2), which is not the case here, even assuming *arguendo* that DMHDD might somehow qualify here as having provided such last-illness hospitalization.

On the other hand, as the Respondent correctly points out, its counterclaim is predicated on a separate, independent statutory liability and statutory cause of action under the Mental Health Code and does not therefore rely on the Wrongful Death Act to authorize recovery. However, notwithstanding this alternative source of the counterclaim's cause of action, we find nothing in the Mental Health Code provisions that supersedes the Wrongful Death Act—or that contravenes the policy of that Act's immunization of wrongful death recoveries from otherwise valid claims against the decedent's estate. Thus, while section 5—105 generally imposes liability on beneficiary-decedents' estates as well as imposing residuary liability on the "responsible relatives" of the decedent, that liability does not reach wrongful death benefits recovered by the estate and distributable to the decedent's survivors.

This takes the analysis to the residual liability of the "responsible relatives" under section 5—105. In this case, under the definition section 1—124 of the Mental Health Code, the "responsible relative" means the decedent's

parent, as Troi Hefti was under 18 when he died. The portion of the claimant estate's wrongful death recovery that is distributable or that is distributed to the decedent's mother, Kay E. Hefti, is thus reachable as her asset, based on her liability as the decedent's "responsible relative" under section 5—105 of the Mental Health Code. (Given our award, the amount thus is issue in the counterclaim is $25,000.) This point was agreed by both parties at the oral argument.

Mrs. Hefti's share of the wrongful death award is reachable through the estate, over which this court has jurisdiction (as it is the Claimant), whereas we lack jurisdiction over Mrs. Hefti personally, as she is not individually a party in this proceeding. Moreover, we find that we can reduce the award to the Claimant estate by the amount of any counterclaim award, under the set-off provision of section 26 of the Court of Claims Act ("any recovery awarded by the court shall be subject to the right or set-off") and under our jurisdictional authority over recoupments under section 8(e) of the Court of Claims Act. (705 ILCS 505/8(e), 505/26.) Although neither of these provisions of our enabling statute creates a cause of action—which must separately be found in statute or common law—both provide procedural authorization to entertain and to give effect to cognizable substantive claims of the State against the Claimant.

This analysis also partly disposes of the Claimant's contention that the DMHDD cannot pursue its "service charges" for Troi Hefti's care as a counterclaim in this court for the reason that the Mental Health Code provides that the State's Attorney of the responsible relative's county of residence shall bring the action. In effect, Claimant contends that the statutory procedure for civil enforcement by the State's Attorneys is exclusive. We disagree. There is no language in the statute so indicating.

Moreover, the provision as written is a directive to the State's Attorneys to sue when so requested by the Department, and not otherwise. See section 5—113 of the Mental Health Code. There is no proviso derogating from the authority of the department or the Attorney General to enforce the "liability" expressly created in section 5—105 of the Mental Health Code. In any event, the set-off provision of section 26 of the Court of Claims Act directs us to entertain set-off claims of the State against "any recovery" we may award to a Claimant.

Thus we come to the two procedural issues that apply specifically to this claim against the Hefti Estate: (1) Claimant's argument that the DMHDD never properly "assessed" any "charges for services" as required by the statute, and (2) that this counterclaim is barred by the 5-year statute of limitations of section 5—113 of the Mental Health Code. These issues arise in the factual context of the DMHDD having first asserted its $52,000 plus claim for "service charges" for Troi Hefti's care in the counterclaim filed in this court, with no prior assertion of these charges to the estate or to Mrs. Hefti individually.

The issues here are whether the DMHDD complied with the procedural requirements of the MHC so that its counterclaim can proceed under the authority of that statute, or whether DMHDD violated any mandatory procedures so that its claim for "service charges" in this case cannot proceed on the basis of the MHC authorization. The MHC procedure commences with the issuance of a "Notice of Determination" by the DMHDD. (405 ILCS 5/5—111.) That notice triggers a series of administrative procedures and appeals, first to the DMHDD staff and then to the 3-member Board of Reimbursement Appeals appointed by the Governor. The "assessment" of the DMHDD also triggers the commencement of the 5-year

limitation period under section 5—113 for civil actions by the State's Attorney against "responsible relatives."[1]

In this case, there was no "notice of determination." This omission had the effect of not allowing the Claimant to dispute the amount of the DMHDD's charges claim in the established administrative channels. (This seems particularly important in a case like this one, where the decedent was under 18, so that not all expenses of his care are chargeable under the statute. *See* MHC section 5—105 of the Mental Health Code.) In the absence of any "assessment" by the DMHDD, the 5-year limitation period seemingly did not commence. On the other hand, the absence of any notice or assessment also short-circuited the specific administrative system established by the legislature for the narrow task of reviewing the legitimacy of DMHDD "service charges."

If the procedures utilized in this case by the DMHDD are allowed, then one of two consequences appears to follow: (1) disputes of DMHDD "service charges" would be remitted to this court for adjudication, or (2) the "responsible relative" or the estate of a deceased recipient would be deprived of any forum in which to contest the "service charges" claim. The former procedure would be clumsy and inefficient, at best, and contrary to the statutory scheme and administrative structure established by the general assembly specifically for adjudication of these specialized "service charge" disputes. The latter would violate due process notions and would be inconsistent with the

[1] There was no agreement by the parties as to what the undefined statutory term "assessment" means in MHC §5—111. A close study of this part of the Mental Health Code dealing with financial responsibility for "service charges" discloses that for this purpose "assessment" refers either to the initial Notice of Determination specified by §5—111 or to a modified determination after a redetermination by the Department or pursuant to a directive of the Board of Reimbursement Appeals under Sec. 5—111 or to a modified determination after a redetermination by the Department or pursuant to a directive of the Board of Reimbursement Appeals under Sec. 5—111. The final determination issued (to the recipient or the estate or the responsible relative) is the "assessment" that starts the 5-year limitation period under Sec. 5—113.

statute as well. We also do not find any purpose to be served by allowing the DMHDD (or its successor) to utilize this Court to circumvent its own statute and its own procedures whenever it neglects to timely issue a notice of determination.

The statute requires the DMHDD to commence the process of assessing and collecting "service charges" from recipients, their estates or their "responsible relative" by issuing a notice of determination, and that notice must be construed to be a condition of the remainder of the statutory scheme, including the imposition of liability. In the absence of a notice of determination, there can be no liability, and no claim or counterclaim predicated on such liability. For this reason, we must dismiss the counterclaim.

5. Allowance of Attorney's Fees.

Claimant's counsel, supported by the Claimant, has petitioned the court to allow him to be paid a contingent fee in excess of the statutory 20% maximum in cases before this court, in accordance with section 26.1 of the Court of Claims Act. (705 ILCS 505/26.1.) Claimant requests 33 1/3%, which request is supported by Mrs. Hefti, the administratrix of the Claimant estate, as well as by the original 1987 fee agreement between them, which was submitted as an exhibit following oral argument, with leave of the Court. The Court conducted a hearing on the fee petition at the oral argument on rehearing and accepted supplemental submissions.

After much deliberation, and after consideration of the parties' agreement, the time expended by counsel, the level of difficulty and complexity of the trial and trial preparation, and of the issues in the case, the Court has determined that an allowance of a contingent fee in excess of 20% is justified. The Court allows a contingent fee of 33 1/3% of the recovery net of expenses and costs that are paid or reimbursed.

Conclusion and Order

For the foregoing reason, we find for the Claimant's negligence claim for the wrongful death of the decedent, and will enter an award for the Claimant. The Respondent's counterclaim will be dismissed for failure to comply with section 5—111 of the Mental Health Code. Accordingly, it is ordered:

1. Claimant Kay E. Hefti, administratrix of the estate of Troi P. Hefti, deceased, is awarded the sum of $100,000 in full and complete compensation for the wrongful death of Troi Hefti for his estate and his heirs, such award to be divided equally between Kay E. Hefti, the decedent's mother, and the decedent's surviving siblings;
2. The Respondent's counterclaim is dismissed; and
3. Payment of a contingent fee of 33 1/3% to Claimant's counsel is allowed, after payment or reimbursement of costs and expenses of this litigation.

(No. 89-CC-0351, 89-CC-0352 cons.—Claim dismissed.)

JOSEPH DAVIS and JEFFREY MCCORMICK, Claimants, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed March 24, 1992.

Opinion filed September 24, 1996.

KOGUT & BEUKE (JOHN M. KOGUT and EDWARD F. COZZI, of counsel), for Claimants.

ROLAND W. BURRIS and JIM RYAN, Attorneys General (THOMAS L. CIECKO and JANICE SCHAFFRICK, Assistant Attorneys General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*Claimant not required to sue third party absent reasonable belief that remedy exists—State's motion to dismiss denied.* The Court of Claims denied the State's motion to dismiss a negligence claim filed by a passenger in a car that was struck by a State police vehicle since, despite the State's contention that the Claimant failed to exhaust his other remedies, there was no reason to believe that the Claimant had any remedy against the driver of the vehicle in which he was riding at the time of the accident.

HIGHWAYS—*when driver of authorized emergency vehicle may proceed past stop sign or signal—duty to exercise due regard for others' safety.* Pursuant to the Motor Vehicle Code, the driver of an authorized emergency vehicle, when responding to an emergency call, may proceed past a red or stop signal or stop sign, but only after slowing down as may be required and necessary for safe operation, and the driver must also exercise due regard for the safety of all persons.

SAME—*duty of operator of vehicle on approach of authorized emergency vehicle.* Section 11—907 of the Motor Vehicle Code provides that, upon immediate approach of an authorized emergency vehicle making use of audible and visual signals, the driver of every other vehicle shall yield the right-of-way and immediately drive to a parallel position as close as possible to the right-hand edge of the highway clear of any intersection and shall, if necessary to permit safe passage of the emergency vehicle, stop and remain in such position until the emergency vehicle has passed.

SAME—*Claimants' vehicle hit median to avoid police car at intersection—negligence claim dismissed.* In the Claimants' action alleging that a State trooper's negligent operation of a police vehicle through an intersection while responding to an emergency call caused their car to swerve and strike a concrete median, the claim was dismissed based upon evidence which indicated that, although the Claimants' vehicle had the green light upon entering the intersection, the State trooper had activated her siren and lights, other vehicles traveling in the Claimants' direction had stopped, the Claimants' car drove around the stopped vehicles and entered the intersection, and both Claimants admitted that their vision was obscured and they were conversing with the radio on at the time of the accident.

OPINION

RAUCCI, J.

This matter comes before us on the Respondent's motion to dismiss for failure of the Claimant to exhaust his remedies by not bringing a civil action against the driver of the vehicle, in which Claimant was a passenger at the time Davis collided into a concrete wall as a result of taking evasive action to prevent collision with a State police car at an intersection.

We have considered the briefs and oral arguments of the parties and proceed to decide the issue presented to us.

Respondent's position is best summarized by the following statement from its reply brief:

> "The essence of the (exhaustion of remedies) requirement is that it is incumbent on the claimant to have the issue of the driver's negligence adjudicated in a civil action before seeking final determination of this claim in this Court."

In support of this proposition, Respondent relies on our decisions in *Patton v. State* (1988), 41 Ill. Ct. Cl. 77 and *Boe v. State* (1984), 37 Ill. Ct. Cl. 72 and their progeny.

A cursory reading of those cases demonstrates that Respondent misapprehends their teaching.

In *Boe*, the driver of the car in which Claimant was a passenger skidded on the road before hitting an allegedly defective post. In *Patton*, the Claimant's driver rear ended a State truck and the State obtained a civil judgment against the driver.

Both section 25 of the Court of Claims Act (705 ILCS 505/25) and section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) require any person who files a claim to exhaust all other remedies and sources of recovery, whether administrative, legal or equitable. This case presents the question of whether the exhaustion requirement is tantamount to a statutory command that a Claimant must sue a third party against whom Claimant has no reasonable belief that a remedy exists. We hold that a Claimant is not so required.

Not only does the plain reading of the statute indicate a lack of legislative intent to require pursuit of nonexistent remedies, but, as pointed out by Claimant, the General Assembly has indicated a contrary intent at the time Claimant filed his complaint.

At that time, the Code of Civil Procedure provided in section 2—611.1 (Ill. Rev. Stat. 1989, ch. 110, par. 2—611.1) as follows:

"Untrue statements * * * allegations and denials, made without reasonable cause, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal."

We do not believe that the General Assembly intended to require Claimants to file frivolous or unfounded actions. The Respondent alleges no facts to demonstrate that a remedy exists to be pursued.

Our responsibility particularly as part of the legislative branch of government, is to follow the intent of the General Assembly.

It is therefore ordered that the Respondent's motion to dismiss is denied.

OPINION

RAUCCI, J.

The claims by Claimants Joseph Davis and Jeffrey McCormick were consolidated for purposes of a hearing. Both claims arise out of the same motor vehicle accident with a State police vehicle and allege that State Trooper Cheryl Banes was negligent in the operation of her vehicle.

Claimant Joseph Davis testified that on November 5, 1987, at approximately 11:30 p.m., he was traveling northbound on an off-ramp of Illinois Route 53 (hereinafter referred to as Ill-53) in Cook County, Illinois. He was driving an automobile and Jeffrey McCormick was a passenger seated next to him. He was approaching the intersection with Illinois Route 72 (hereinafter referred to as Ill-72). There are traffic control lights at the intersection of Ill-53 and Ill-72. The off-ramp of Ill-53 had four

lanes. The two left lanes were turn lanes and the two right lanes were straight ahead lanes. Claimant was in the far right lane with no vehicles in front of him. The traffic light for his lane was green. Prior to entering the intersection, he did not observe any emergency vehicles or emergency or flashing lights, or hear any sirens or horns. Upon entering the intersection, he did not observe any emergency vehicles, or emergency or flashing lights, or hear any sirens or horns. After entering the intersection, he saw a vehicle to his left. He was in the middle of the intersection when he saw the vehicle. It was approximately ten to 15 feet from his automobile. He believes it was traveling approximately 40 miles per hour.

On the west side of the off-ramp, Ill-53 crosses over Ill-72. Ill-72 runs east and west. Where Ill-53 crosses over Ill-72 it is an overpass. There is a big grassy hill obstructing ground level views because Ill-53 is built up.

When Claimant saw the headlights of the vehicle, he did not hear any sirens. He cut the wheel to the right and accelerated. He avoided colliding with the vehicle. He struck the median separating eastbound and westbound Ill-72. There is an island median where a traffic light is mounted on the curb. He struck the curb and the car went airborne, coming down on the north side of Ill-72 and struck another median located for a turn lane off of westbound Ill-72 to enter northbound on Ill-53. His automobile came to rest 20 to 30 yards further away.

After his automobile came to rest, Jeffrey McCormick fell out. There was fire underneath his car. He dragged Claimant McCormick away from the car. He learned the driver of the vehicle he nearly collided with was an Illinois State trooper.

Claimants Davis and McCormick were transported by ambulance to Alexian Brothers Hospital. A doctor saw

Davis and he was released. A few days later he went to a doctor at the Dempster Clinic. He had back pains, neck pains, headaches and a sore ankle. The treatment he received relieved some of the pain. He still experiences neck pain and has headaches two days a week. He takes aspirin. He has not seen any doctors in relation to his back or neck injury since three months after the accident. He did see Dr. John Diveris in regard to his ankle.

He had strained tendons and ligaments. He wore an air cast for three weeks. He had stiffness for three or four years. He missed one week of work from Dominick's Finer Food Stores and lost $300 in wages. His vehicle was worth approximately $3,000 and was a total loss.

On cross-examination, Claimant Davis acknowledged that his radio was on at the time of the accident. He was talking to Claimant McCormick at the time of the accident. Claimant's testimony on direct examination of lost wages was impeached when counsel showed that Claimant stated in his deposition that he did not lose any days off work or any wages. Claimant also stated in his deposition that he experienced headaches once a week.

Claimant Jeffrey McCormick testified that he was a passenger in an automobile driven by Joseph Davis on November 5, 1987. He described the four lanes differently than did Joseph Davis. He also testified that they were in the third lane from the left, contrary to Claimant Davis' statement that they were in the fourth lane from the left. Eastbound traffic on Ill-72 comes from under the viaduct. The road is built up forming a hill that obstructs vision. He saw that the light was green as they approached the intersection of Ill-53 and Ill-72. He did not observe any emergency vehicles, or emergency lights or flashing lights, or hear any sirens or horns, either prior to, or upon, entering the intersection. When they were halfway through the

intersection, he saw headlights to his left. Claimant Davis turned very hard to the right and accelerated. He estimated that the vehicle was traveling between 40 and 50 miles per hour. They hit the median and the car went up on two wheels, and hit another median across the street. He does not believe he fell out of the car. He opened the door after the car came to a rest and was lying next to the car. His neck and shoulder struck the car's interior.

He was taken by ambulance to Alexian Brothers Hospital. He was examined and released. He saw Dr. Anderson at the Dempster Clinic and Dr. Bikshorn at Northwest Neurological. He later received an electromyogram from another doctor. He received physical therapy for several weeks. He was experiencing tingling feelings shooting down his arm into three fingers in his right hand. He received an examination at Humana Hospital at the direction of Dr. Bikshorn. He returned in February 1988, to Dr. Anderson because of the tingling feeling in his fingers. He still experiences tingling feelings and dull pain in his fingers approximately three days a week and has lost strength in his right hand. His neck is stiff most of the time.

Claimant McCormick stated that he lost about five weeks of work, and approximately $2,550, as an automobile painter at Trailwood Auto Body in Wheeling because of the accident.

On cross-examination, Claimant McCormick acknowledged that at his deposition he stated that he lost two weeks, and approximately $1,500, from work. Claimant does not know whether the $818 bill from Dr. Anderson at Dempster clinic had been paid. He believed all others were paid. He is not seeing any doctors and does not plan to see any doctors. He is not on any medication. Claimant has skated since the accident. He played hockey prior to the accident, but not afterwards.

Trooper Cheryl Banes testified that at the time of the incident she was a trooper with the Illinois State Police. At approximately 11:30 p.m. on November 5, 1987, she was eastbound on Ill-72 approaching the intersection with Ill-53. The overpass of Ill-53 obscures some vision of the intersection with the off-ramp of Ill-53. She was on an emergency call the night of the accident. The call she received was of an accident involving a car and a deer with a report of personal injuries. She was traveling on Ill-53 when she received the call and she exited Ill-53 onto Ill-72. She activated her lights and siren as soon as she got the call, but she does not remember her rate of speed. She believes she was proceeding south on the Ill-53 off-ramp and was traveling at approximately 20 to 25 miles per hour and slowed to make the turn onto Ill-72. She turned left heading east on Ill-72. The intersection of the Ill-53 northbound off-ramp and Ill-72 is not under the overpass of Ill-53. She was traveling at approximately 20 to 25 miles per hour as she approached the intersection.

Trooper Banes first saw Claimants' vehicle when it was in front of her. Trooper Banes believes the intersection is approximately 100 feet in width. She did not see any vehicles moving. She was driving a semi-marked car with grille lights and emblem markings on the door and trunk. She looked to the right and did not see Claimants' vehicle enter the intersection, but it would have had a green light. When she saw the vehicle in front of her she hit the brakes. She did not hear the tires squeal and did not leave skid marks.

Trooper Banes received training for driving in emergency situations while she was at the State Police Academy. Prior to the accident, she had driven a vehicle in response to an emergency call at least 100 times. On the night of the incident, she was driving a semi-marked vehicle with emblems on the door, two rear deck lights on the

inside of the vehicle, two emergency lights, one red and one blue in the front of the grille and the headlights were wigwags. Wigwags alternate high and low beams. The siren comes from the front of the grille. She received a call of an accident involving a car and a deer and there were injuries sustained by the driver and/or passengers. She responded as an emergency call because personal injuries were involved. She activated the wigwag headlights, the emergency lights in the grille and rear deck, and the siren while she was on Ill-53. When she turned left from the off-ramp of Ill-53 and approached the overpass she turned on her intermittent siren. She remembers that her light had been green and it just turned red. When she proceeded through the intersection all she saw was the vehicles that were stopped. The next thing she saw was Claimants' car in front of her. She hit her brakes and observed the car had hit the raised median. She proceeded to where she could turn around and come back, which she did. She was not reprimanded, suspended or discharged by the Illinois State Police because of the incident.

On cross-examination, Trooper Banes acknowledged that she does not know whether or not there was a personal injury to a driver or occupant of the car accident she was en route to investigate.

Sergeant Mark Omura testified that he was a field supervisor/sergeant on the date of the accident and that he investigated the accident on November 5, 1987. He interviewed Trooper Banes at the scene of the accident. Trooper Banes related her description of what occurred to him. She also told him there were some stopped vehicles on the northbound lanes. According to Banes, the northbound traffic control signal had changed to green but vehicles had stopped at the intersection. He interviewed both Claimants. In his interview with Mr. McCormick,

Sergeant Omura learned that he did not see the emergency lights and was not wearing a seat belt.

Sergeant Omura interviewed witnesses at the scene and learned that Claimants' vehicle pulled around vehicles that had stopped for the emergency vehicle, that was traveling eastbound, and entered the intersection. His determination was that this accident was non-preventable and that Trooper Banes was not at fault. The accident review board determined that the accident was non-preventable.

On cross-examination, he stated that he determined Claimants' car pulled around vehicles and entered the intersection based upon statements by two witnesses, Mr. Murbach and Mr. Carter. Trooper Banes did enter the intersection against a red light. In Murbach's statement, there is no mention of Claimants' car pulling around Murbach's car. Sergeant Omura never confirmed whether there was an accident involving personal injuries to which Trooper Banes was proceeding. Part of his report erroneously indicated that Mr. McCormick was the driver. Although he issued a citation to Mr. McCormick for not wearing a seat belt, he does not recall where he interviewed him.

Claimants argue that Trooper Banes violated the standard of ordinary care when she drove her semi-marked patrol car into a crowded intersection while her vision was obscured and at a speed which was excessive under the circumstances. The Respondent's supposition of non-liability is predicated upon sections 11—205 and 11—907 of the Motor Vehicle Code, hereinafter referred to as the Code. 625 ILCS 5/11—205(b), (c)2, and 5/11—907(a).

As to emergency vehicles, section 11—205 of the Motor Vehicle Code provides:

"§11—205. Public officers and employees to obey Act—Exceptions.

(a) The provisions of this Chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated

by the United States, this State or any county, city, town, district or any other political subdivision of the State, except as provided in this Section and subject to such specific exceptions as set forth in this Chapter with reference to authorized emergency vehicles.

(b) The driver of an authorized emergency vehicle, *when responding to an emergency call* or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this Section, but subject to the conditions herein stated. [Emphasis added.]

(c) The driver of an authorized emergency vehicle may:

* * *

2. *Proceed past a red or stop signal or stop sign, but only after slowing down as may be required and necessary for safe operation;* * * *." [Emphasis added.]

As to Claimants, section 11—907 of the Motor Vehicle Code provides:

"§11—907. Operation of vehicles and streetcars on approach of authorized emergency vehicles.

(a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of this Code or a police vehicle properly and lawfully making use of an audible or visual signal,

> (1) the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection and shall, if necessary to permit the safe passage of the emergency vehicle, stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer * * *."

Crucial to a just and equitable resolution of the matters before the court are sections 11—205(e) and 11—907(b) of the Motor Vehicle Code which state:

"§11—205. Public officers and employees to obey Act—Exceptions.

(e) The foregoing provisions do not relieve the driver of an authorized emergency vehicle from the duty of driving with due regard for the safety of all persons, nor do such provisions protect the driver from the consequences of his reckless disregard for the safety of others."

and

"§11—907. Operations of vehicles and streetcars on approach of authorized emergency vehicles.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway."

The driver of an emergency vehicle must exercise the standard of ordinary care in an emergency situation. In *Bouhl v. Smith*, 130 Ill. App. 3d 1067, 475 N.E.2d 244, the Court considered sections 11—205 and 11—907 of the Motor Vehicle Code. The parties were involved in a motor vehicle accident. The citizen driver, Bouhl, was operating a vehicle on a two-lane road nearing a "T" intersection. She had come to a stop behind other stopped vehicles. Officer Smith at that time was to the rear of and proceeding in the same direction as Ms. Bouhl. Officer Smith stated he was traveling below the posted speed limit, seeing the line of vehicles stopped, he pulled into the oncoming lane of traffic to pass. At that time a vehicle turned onto the road at the intersection thus creating a head-on situation between the vehicle which had just turned and Officer Smith's car. Smith then swerved his squad back into what would be the correct lane for his direction of travel, applied his brakes and slid into the rear of Bouhl's vehicle. The jury found for the defendant. The *Bouhl* Court, applying the standard set forth in *Pedrick v. Peoria & Eastern Railroad Co.* (1967), 37 Ill. 2d 494, 229 N.E.2d 504, reversed the trial court's denial of plaintiff Bouhl's motion for judgment notwithstanding the verdict and remanded the cause to the trial court with directions to enter a judgment for the plaintiff on the issue of liability. *Bouhl*, 435 N.E.2d at 245.

In *Mayfield v. City of Springfield* (1982), 103 Ill. App. 3d 1114, 432 N.E.2d 617, the court was presented with a factual situation similar, but distinguishable, to that of the Claimants in this matter. The facts in *Mayfield* disclose that an emergency vehicle in the act of answering a call collided with a citizen driver resulting in the death of the citizen and damage to nearby property. Ms. Mayfield

was enroute to a church function approaching an intersection where she was intending to make a left turn. She proceeded into the intersection as she had a green light. Officer Hughes at this time was proceeding west on the road which Ms. Mayfield was intending to turn onto. He deemed this call to be urgent. He activated his siren and flashing lights and drove toward the intersection where decedent was waiting to turn. The traffic light governing the right-of-way for traffic proceeding in the direction the officer was traveling was red. As he neared the intersection, he used the left turn lane to pass a number of cars that were stopped. He then proceeded into the intersection where he collided with decedent's vehicle.

The officer's view of the intersection was obstructed or impaired by a school gymnasium, stopped vehicles, the setting sun and shadows cast by a building on a corner of the intersection. The jury concluded the defendant police officer was not negligent and as such denied recovery to plaintiffs. As in *Bouhl, supra*, the *Mayfield* court reversed the trial court, held the jury's verdict for naught and entered judgment for the plaintiffs, finding the defendant was negligent as a matter of law and remanded the decedent's case for a determination of damages.

The Appellate Court, in *Mayfield*, stated:

"'The driver of an authorized emergency vehicle may * * * [p]roceed past a red or stop signal or stop sign, but only after slowing down as may be required and necessary for safe operation.' (Ill. Rev. Stat. 1979, ch. 95½, par. 11—205(c)(2).) This suspension of the rules of the road is available only 'when responding to an emergency call' (Ill. Rev. Stat. 1979, ch. 95½, par. 11—205(b)) and only when 'due regard for the safety of all persons' is exhibited. (Ill. Rev. Stat. 1979, ch. 95½, par. 11—205(e)). This special rule governing drivers of emergency vehicles permits them to cautiously circumvent strict application of the traffic laws in the interest of hastening their mission, thus promoting the public safety and welfare. It does not permit them carte blanche authority to charge into heavily traveled urban intersections in defiance of all reason as if bearing the colors for General Pickett. To so construe the authority of section 11—205 would undermine the very purposes of public safety and welfare that the statute was intended to serve." *Mayfield, supra*, 619, 620.

To prevail Claimants must prove, by a preponderance of the evidence, the negligence of Trooper Banes was the proximate cause of injury to them and that damages naturally flowed from the injury. *Stanley v. State* (1986), 39 Ill. Ct. Cl. 107, 110.

Mayfield, supra, did not discuss the standard of care. It held, as a matter of law, that the officer was negligent in that he failed to exercise "due regard" for the circumstances.

Bouhl, supra, does not clearly set forth the basis of the Court's holding.

At 130 Ill. App. 3d 1067, at 1069, the Appellate Court stated:

"* * * The question of negligence is measured by what a reasonable, prudent emergency vehicle driver would do under all of the circumstances, including that of the emergency. [Citations omitted] * * *."

The Appellate Court then went on to address "ordinary negligence standards" and concluded that:

"We hold that under the circumstances here presented, the defendant has failed to carry his burden of proving that his vehicle was under sufficient control to proceed in the left-hand lane with due regard for the safety of others. Neither the presence of the unknown motorist, nor the existing weather and road conditions, nor the emergency to which Smith was responding provides an adequate explanation or excuse for the defendant's failure to maintain control of his squad car so as to avoid colliding with the plaintiff's truck. Where, as here, it is clearly established that the plaintiff performed no act or omission which could in any way be considered negligent, and the perilous situation which led to the accident was a creation of the defendant emergency vehicle operator's own negligence, then the defendant must be found negligent."

As to the negligence of Trooper Banes, this court has held that the conduct of a driver of an emergency vehicle is measured against a specific statutory standard contained in the Illinois Vehicle Code. *Bauman v. State* (1981), 34 Ill. Ct. Cl. 140, 143-145.

A police vehicle is an authorized emergency vehicle. (625 ILCS 5/1—105.) The court has held that a police

officer in responding to an emergency call must use a siren when necessary to warn pedestrians and other drivers of her approach and drive with due regard for the safety of others. *Bauman, supra,* at 145.

Not only was Trooper Banes using her siren and lights, but was using them in a fashion to warn other drivers on the road. While we accept the Claimants' testimony that they did not hear the siren or see the flashing lights, her uncontradicted testimony is that she activated her siren and lights well before arriving at the intersection. Other drivers at the scene traveling the same direction as Claimants had all stopped even though that traffic had a green light.

Claimants argue that they did not hear a siren or see any flashing lights. But they admit being in a closed vehicle, talking to each other with the radio on. Clearly, Davis, the driver, came to the intersection, saw the green light and drove through. They were distracted, in conversation and with the radio as background. That can hardly have been the fault of Trooper Banes.

There is further the finding by Sergeant Omura that Davis drove around stopped vehicles and entered the intersection. This is supported by the contradictory testimony of Davis and McCormick as to which lane they were in when they approached the intersection.

Claimant sites *Mayfield v. City of Springfield* (1982), 103 Ill. App. 3d 1114, as an identical case and grandly pronounces Trooper Banes negligent as a matter of law. A closer look at *Mayfield* finds the facts far removed from those in the instant case.

In *Mayfield*, the Illinois Appellate Court reversed the denial of a motion for judgment notwithstanding the verdict. A Springfield city police officer, while proceeding

through an intersection, struck and killed a driver on her way to church. The Appellate Court found the officer was negligent. It cited the following facts: the officer's view of the intersection was blocked by a gymnasium; his observation of the intersection was obstructed by vehicles stopped in the other lane of traffic; his vision was impaired by the setting sun glaring in his eyes; his perceptions were diminished by long shadows cast by a multistory building at the corner; and that it was physically impossible to have been driving 20 miles per hour.

The obvious difference between *Mayfield* and this case is that there is no evidence that Banes' view of the intersection was in any way blocked, obstructed or impaired in any way. Claimant cites the transcript and states "also it was agreed the Claimants' view of the intersection was obstructed by the overpass, the grassy knoll and other vehicles stopped at the intersection." The record reveals no such "agreement."

Respondent cites, *Nolan v. Elliot* (1989), 179 Ill. App. 3d 1077, 1083, as being similar because Banes slowed to 25 miles per hour at the intersection.

Claimants' claim should be denied because of their failure to prove negligence on the part of Trooper Banes and because of the speculative nature of their claim for damages.

We find that Claimants did not carry their burden of proof to establish that Trooper Banes negligently entered the intersection and that Respondent is not liable for Claimants' injuries. Trooper Banes testified that her lights and siren were utilized. No evidence was offered to refute this fact. Claimants only contend that they did not see her vehicle or lights and did not hear the siren. Claimants admitted their radio was operating. The evidence indicates that Claimants' vehicle entered the intersection, even though

Mr. Carter and Mr. Murbach indicated that other vehicles noticed the emergency vehicle and stopped prior to the intersection. Claimants fail to agree on which lane their vehicle was in. Claimant Davis stated that they were in the fourth lane from the left and Claimant McCormick said they were in the third lane from the left. Claimants both admit that their vision was obscured.

The evidence does not establish that Trooper Banes acted in a manner contrary to the standard of care.

It is therefore ordered, adjudged and decreed that this claim be, and it is hereby, dismissed with prejudice and forever barred.

(No. 89-CC-1196—Claimant awarded $2,000, petition for attorney fees denied.)

JOHN WILLIAMS, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 28, 1996.

Order filed May 7, 1997.

JAMES PAUL COSTELLO (SHANNON M. HEILMAN, of counsel), for Claimant.

JIM RYAN, Attorney General (MICHAEL ROCKS, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*State owes duty to provide safe work place for inmates.* The State has a duty to provide a safe work place for its inmates.

SAME—*negligence—plaintiff's burden of proof.* The burden of proof in a negligence action is on the plaintiff to prove by a preponderance of the evidence both the existence of injuries and that they were the result of the occurrence of which the plaintiff complains, and when the injury is remote in time from the accident or there has been an intervening prior or subsequent injury or disease, layman testimony may be insufficient to establish a prima facie showing of a causal relationship, but medical testimony is not necessary where the condition is clearly apparent from the illness and surrounding circumstances.

SAME—*inmate injured in fall down stairs while carrying pans—State was negligent—award granted.* An inmate who fell after he was ordered to carry several large food pans down a slippery concrete stairway established that the State was negligent and was awarded damages for his pain and suffering after the fall, but he was denied further recovery for his alleged present injuries because he failed to prove, through expert medical testimony, that he currently suffered a permanent traumatic injury as a result of the fall.

ATTORNEY FEES—*petition to adjudicate attorneys' lien denied.* Where attorneys who represented an inmate in his successful negligence claim against the State filed a petition challenging the State's deduction of delinquent child support from the inmate's award and seeking to enforce their lien for fees and costs, the petition was denied, since a delinquent child support deduction under the State Comptroller Act takes priority over a claim under the Attorneys' Lien Act, and the attorneys failed to prove the existence of a valid and enforceable lien in any event.

OPINION

SOMMER, C.J.

This is a claim for damages for personal injuries allegedly caused by the negligence of the State.

This Claimant at the time of the incident complained of was an inmate at the Lincoln Correctional Center. On October 29, 1987, the Claimant was working on a food detail on the second floor of the multi-purpose building. He was told to carry three food pans down the stairs. One of the pans was 5 inches deep and 14 inches long, the other two were 2½ inches deep. The pans were stacked on top of one another. The Claimant could not see directly below where his feet were. The stairs were smooth concrete stairs with no slip-resistant materials applied to them. The Claimant was wearing prison issue shoes with plastic bottoms. The Claimant was told in no uncertain terms to hurry by the prison authorities present. Harry Beavers, a prison employee, had seen water on the top three stairs and had sent for a mop just before the Claimant used the stairs. The Claimant slipped on the stairs and fell to the bottom.

The Claimant was taken to the infirmary and kept over night. He had complaints of neck, head, and back

pain and a bruise on his buttocks. He returned to the infirmary a few days later and was kept there for a week. He later returned numerous times with complaints of back pain and numbness and pain down his left leg. He was sent to Lincoln Memorial Hospital for X-rays and a neurological examination. The neurologist's impression was S-1 radiculopathy, which is defined as any disease of the spinal nerves. *Schmidt's Attorney's Dictionary of Medicine*, 1995, Vol. 4, P. R-8.

The State does have a duty to provide a safe work place for its inmates. (*Reddock v. State* (1978), 32 Ill. Ct. Cl. 511.) We conclude that the State breached its duty in this instance, and that the Claimant's injuries were caused by the State's negligence. The Claimant was carrying pans such that he could not see directly in front of him. He was told to hurry. He had no choice. The steps had water on them. We have in the past found liability where inmates are required to walk through water. *Coley v. State* (1991), 44 Ill. Ct. Cl. 153; *Hammer v. State* (1987), 40 Ill. Ct. Cl. 173.

The institutional medical records show that the Claimant complained of back pain from the time of the injury through 1990. The Claimant testified at the trial that he continues to suffer from back pain and is unable to work.

"The burden of proof is on the plaintiff to prove by a preponderance of evidence not only that injuries exist but that they were the result of the occurrence of which he complains." *Bugariu v. Conley* (1981), 93 Ill. App. 3d 571, 417 N.E.2d 719.

The Claimant introduced no testimony as to his present condition other than his own.

"When the injury is remote in time from the accident or the condition is one shrouded in controversy as to origin, such as the intervention of either a prior or subsequent injury or disease layman testimony may be insufficient to establish a prima facie showing of a causal relationship." *Hyatt v. Cox* (1965), 57 Ill. App. 2d 293, 206 N.E.2d 260.

In the present claim, the Claimant is complaining of a traumatic injury but the neurologist's impression was one of disease.

"Medical testimony is not necessary to prove the causal connection where the condition is clearly apparent from the illness and circumstance attending it." *Jackson v. Narvik* (1976), 37 Ill. App. 3d 88-95, 346 N.E.2d 116-123.

In the present claim, the Claimant's current condition is not clearly apparent from the diagnosis given by a medical specialist near the time of the injury.

We find that the Claimant's testimony concerning his condition at the time of trial alone does not meet the burden of proof required of the Claimant to establish a *prima facie* case of causation or the existence of the injury. The injury was remote in time and the connection between the diagnosis of disease near the time of the injury and the claim of a permanent traumatic injury is not clearly apparent. The Claimant could have introduced expert medical testimony but did not do so.

The Claimant's medical expenses were paid by the State; however, he did undergo a certain amount of pain and suffering after his fall. We, therefore, award the Claimant $2,000 for pain and suffering in full and complete satisfaction of this claim.

ORDER ON PETITION TO ADJUDICATE ATTORNEYS LIEN

SOMMER, C.J.

This cause returns on a petition filed by Claimant's counsel pursuant to the Attorneys Lien Act (770 ILCS 5/1), challenging a delinquent child support deduction made by the State Comptroller from Claimant's award.

On August 28, 1996, this Court issued its decision awarding Claimant $2,000. On September 25, 1996, the

comptroller notified Claimant that the entire amount had been consumed by past due child support in accordance with sections 10.05 and 10.05a of the State Comptroller Act. (15 ILCS 405/10.05 and 10.05a.) Those sections provide in pertinent part as follows:

"§10.05. Deductions from warrants and payments for account or claim in favor of State—Statement of reason. Whenever any person shall be entitled to a warrant or other payment from the treasury or other funds held by the State Treasurer, on any account, against whom there shall be any account or claim in favor of the State, then due and payable, the Comptroller, upon notification thereof, shall ascertain the amount due and payable to the State, as aforesaid, and draw a warrant on the treasury or on other funds held by the State Treasurer, stating the amount for which the party was entitled to a warrant or other payment, the amount deducted therefrom, and on what account, and directing the payment of the balance; which warrant or payment as so drawn shall be entered on the books of the Treasurer, and such balance only shall be paid."

"§10.05a. Deductions from warrants and payments for satisfaction of past due child support. At the direction of the Department of Public Aid, the Comptroller shall deduct from a warrant or other payment described in Section 10.05 of this Act, in accordance with the procedures provided therein, and pay over to the Department that amount certified as necessary to satisfy, in whole or in part, past due support owed by a person on account of support action being taken by the Department under Article X of The Illinois Public Aid Code, whether or not such support is owed to the State. Such deduction shall have priority over any garnishment except that for payment of state or federal taxes. In the case of joint payees, the Comptroller shall deduct and pay over to the Department the entire amount certified."

Claimant's counsel asserts entitlement to one-third of the award, $666.67, for contingent attorney fees plus an additional $946.88 in costs and expenses. Thus, Claimant's counsel contends that $1,613.55 of the $2,000 award is subject to an attorney's lien and is therefore immunized from seizure to pay Claimant's delinquent child support.

The Court notes that the contingent fee sought by Claimant's counsel exceeds the 20% limitation set forth in section 26—1 of the Court of Claims Act. (705 ILCS 505/26—1.) Accordingly, the court finds that counsel's purported lien would only be enforceable to the extent of

$1,346.88 ($400 contingent fee plus $946.88 in costs and expenses) assuming, *arguendo*, that a valid and enforceable lien exists.

On its face, section 10.05a of the State Comptroller Act plainly indicates that delinquent child support deductions can only be subordinated by garnishments for the payment of State or Federal taxes. No mention is made in section 10.05a of attorneys' liens or any other liens, for that matter, as being capable of taking priority over delinquent child support deductions. For its part, the Attorneys' Lien Act (770 ILCS 5/1) is silent on the question of priorities. Given the clear language of section 10.05a and the absence of any statutory provision which would give priority to an attorney's lien, we hold that a section 10.05a delinquent child support deduction takes priority over a claim under the Attorneys' Lien Act.

Alternatively, we find that Claimant's counsel has failed to prove that the purported attorney's lien here was ever perfected so as to actually attach to Claimant's award. Cases construing the Attorneys' Lien Act have routinely noted that the Act is a purely statutory creation which was unknown at common law and that, as such, the Act's provisions must be strictly followed in order for a valid and enforceable lien to come into existence. (See, e.g., *In re Kleckner*, 93 B.R. 143, 145 (N.D. Ill. 1988); *Unger v. Checker Taxi Co.* (1961), 30 Ill. App. 2d 238, 241, 174 N.E.2d 219, 221; and *Cazalet v. Cazalet* (1944), 322 Ill. App. 105 107, 54 N.E.2d 61, 63.) Under the Act, notice must be accomplished by either personal service or registered or certified mail:

> "* * * To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action." 770 ILCS 5/1.

The attorneys lien does not attach until actual service of the above notice has taken place. (*Cazalet*, 322 Ill. App. at 107, 54 N.E.2d at 63.) Here, Claimant's counsel has failed to prove that the statutory notice was *ever* properly served on Respondent, let alone prior to the Comptroller's September 25, 1996, notification concerning the delinquent child support. Thus, there never was a valid and enforceable attorney's lien.

It is therefore ordered that the petition to adjudicate filed herein by the law firm of James Paul Costello, Ltd. is denied.

(No. 89-CC-2702—Claim denied.)

ANTHONY JOHNSON-BEY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed July 5, 1996.

ANTHONY JOHNSON-BEY, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL J. CIASTKO, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*medical care—duty owed by State to inmates.* The State has a duty to provide proper health treatment for inmates in its custody and must exercise ordinary and reasonable care for the inmate's health and life under the circumstances of the particular case.

SAME—*what Claimant in medical negligence case must prove.* To prevail in a medical negligence case, the Claimant must prove by expert testimony the standard of care, that the State deviated from the standard of care, and that the deviation was the proximate cause of the Claimant's injury.

SAME—*back pain—lack of expert testimony defeated inmate's medical negligence claim.* Where an inmate sought damages for medical negligence alleging that the prison medical staff failed to provide him with a lower bunk for approximately 30 days after a low bunk was prescribed by the inmate's physician for his back pain, the claim was denied because, although there was sufficient evidence that the State was negligent in not following the doctor's orders, the inmate failed to provide expert testimony to establish that his alleged injury was proximately caused by the State's negligence.

OPINION

FREDERICK, J.

Claimant, Anthony Johnson-Bey, filed his claim in the Court of Claims on February 28, 1989. Claimant seeks $125,000 in damages for the alleged failure of the State of Illinois to provide Claimant, an inmate of the Illinois Department of Corrections, with adequate medical care. This is a medical negligence claim. The cause was tried before the Commissioner on July 25, 1995.

Claimant testified that he was transferred to Graham Correctional Facility from Stateville Correctional Center on August 25, 1988. Upon his arrival at Graham, he was to have an initial medical screening to assess his medical condition and determine if he had any standing medical orders from Stateville. Claimant's medical records indicate he was to be referred to a medical doctor for back pain "ASAP." His medical condition stemmed from an earlier incident in March of 1986 where he suffered a low back injury in the L-4, L-5 vertebrae which was diagnosed as a herniated disc. Upon arrival at Graham, Claimant had his initial screening and was referred to the medical doctor. The records indicate, as of August 27, 1988, that Claimant was having low back pain which he had had for years. Claimant had been scheduled to see an orthopod prior to his transfer but had not seen that specialist prior to transfer. The records also indicate that there was no inflammation or tenderness in the area by palpation and that Claimant was to receive Naprosyn and a low bunk. Claimant was to return to the doctor in one month. The physician also noted the possibility of a small herniation of the nucleus pulposus of the L-4 and L-5 vertebrae and that Claimant had chronic back pain.

Claimant further testified that the outside medical contractors only entered the orders and it was up to the

medical staff at the facility to insure that the orders were enforced. Claimant argues that the physician's orders were not enforced by the medical staff at the facility. Claimant states that it took the staff almost a month to enforce the orders.

Claimant testified that when he was first moved to a housing unit at Graham, he was put on a top bunk against the doctor's orders.

On September 30, 1988, more than a month after the doctor's initial orders, Claimant declared himself a medical emergency so that he could be treated by medical personnel immediately rather than be seen at random. Claimant's medical records from September 30, 1988, indicate that Claimant complained of having a muscle strain on the left flank because he had to climb out of a top bunk. There was no sign of redness. Claimant continued to ask about a low bunk, saying he should have a low bunk. Claimant was in a top bunk from August 25, 1988, until September 30, 1988. Claimant would have to step on the toilet, step on the sink, and then propel himself into his top bunk. Getting down again was also a tedious event.

The medical records of Nurse Olindeski also indicate that M.D. ordered low bunk—inform inmate would assume it would be issued. Claimant was insistent in obtaining information about who was responsible for not giving him a low bunk.

Later in the day on September 30, 1988, Claimant was seen by a doctor. The doctor noted Claimant complained of having back pain from getting down from a high bunk. Tenderness was noted in the L-4 and L-5 areas. The doctor ordered that Claimant was not to lift for exercise, was to have a backboard for three months, and

that if the problem persisted, he was to see an orthopod as soon as possible. Claimant was prescribed Flexeril and Naprosyn. Claimant testified that he received everything that was ordered and that his condition improved. He received physical therapy. Claimant received and continues to receive a low bunk.

Claimant testified that his back pain has not completely gone away. He indicates that he still experiences weakness in that area.

At the time of trial, Claimant had completed all of his treatment. Claimant testified that he believes because of the improper care and treatment he received at Graham, he is unable to lift heavy objects. He also believes he won't be able to do any manual labor when he goes back into society. Claimant was scheduled to be released in December of 1995.

Claimant feels his back injury was documented and that the medical staff ignored the doctors' orders about a low bunk for over a month. He was having pain from August 25, 1988, from being assigned to a top bunk.

On cross-examination, Claimant indicated that on September 30, 1988, he slipped on a chair while climbing down from the top bunk. Claimant's medical records indicate that his lower back pain dated back to 1986, and that he had received considerable care and treatment from 1986 through 1988. Claimant received treatment for lower back pain approximately 100 times between March of 1986 and March of 1989. Claimant also admitted that prior to August of 1988, he could not lift heavy objects because of his back problems. He feels, however, that this inability to lift heavy objects was aggravated by his being in a top bunk for over a month. Claimant called no other witnesses and stated he did not think he needed any other witnesses.

The Law

Claimant alleges that he was denied proper medical care and treatment by the Illinois Department of Corrections because the Department failed to give him a lower bunk for approximately 30 days when a lower bunk was prescribed by his physician. The State of Illinois has a duty to provide proper health treatment for inmates in the custody of the State and the State must exercise ordinary and reasonable care for the inmate's health and life under the circumstances of the particular case. *Peters v. State* (1987), 40 Ill. Ct. Cl. 152; *Starnes v. State* (1992), 45 Ill. Ct. Cl. 285.

In a medical negligence case, to prevail, the Claimant must prove by expert testimony the standard of care, that the State deviated from the standard of care, and that the deviation was the proximate cause of Claimant's injury. Claimant has failed to present any expert testimony to establish the standard of care, that Respondent deviated from the standard of care, and most importantly, that the deviation was a proximate cause of the Claimant's injury. *Williams v. State* (1994), 46 Ill. Ct. Cl. 221.

In this case, the court can find, based on the evidence and without an expert, that the State was negligent in not following the doctor's orders to provide Claimant with a lower bunk. However, without expert testimony, we cannot find that Claimant's alleged injury was proximately caused by Respondent's negligence. (*Williams v. State* (1994), 46 Ill. Ct. Cl. 221, 224.) The proof of proximate cause in this case is nonexistent. Claimant has, therefore, failed to meet his burden of proof by failing to prove proximate cause by expert testimony. This court cannot speculate as to Claimant's back pain and how it was caused.

For the foregoing reasons, it is the order of this court that Claimant's claim be and hereby is denied.

(No. 90-CC-0251—Claim denied.)

GLENN M. BAHL, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 25, 1997.

HOHLT, HOUSE, DE MOSS & JOHNSON, for Claimant.

JIM RYAN, Attorney General (GREGORY T. RIDDLE, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*duty owed by State to users of parks—State not insurer.* The State owes a duty of care to the users of its parks to reasonably maintain the premises, but the State is not an insurer of the safety of persons who visit its parks.

SAME—*elements of claim—risks assumed by invitees to State parks.* In order for a Claimant to recover upon a theory of negligence, he must prove by a preponderance of the evidence that the State breached its duty of reasonable care, that the breach was a proximate cause of the Claimant's injuries, that the Claimant was damaged as a result of the negligence, and that the State had actual or constructive notice of an alleged defect or dangerous condition, and invitees to State parks assume the normal and obvious risks attendant to use of the premises.

SAME—*fall in hole at State park—no notice established—claim denied.* The Claimant was denied recovery in his negligence action for injuries sustained when he slipped and fell in a four to six inch hole at a State park, since the Claimant presented no evidence that the State had actual or constructive notice of the alleged defect, and he voluntarily assumed a risk by ingesting alcohol and walking through the grassy, dimly lit area which was not a designated walkway and was frequently used by trucks and mobile homes.

OPINION

FREDERICK, J.

Claimant, Glenn M. Bahl, filed his complaint sounding in negligence and seeking damages of $66,256.03 in this court on August 23, 1989. This is a tort claim against the Respondent, State of Illinois, for personal injuries for when Claimant allegedly slipped and fell in a rut or hole in a field at the Du Quoin State Fair on August 29, 1987. The Respondent has denied the material allegations of the complaint and has affirmatively alleged that the Claimant's injuries were caused by the negligence of the Claimant.

At trial, Claimant testified that at the time of the accident he was a track foreman for the Union Pacific Railroad and was 47 years of age. Claimant was in attendance as a member of the general public at the Du Quoin State Fair to watch a concert. After attending the concert, the Claimant was on his way back to his car which was parked in the parking lot southeast of the State Fair grandstands. Claimant was following a path that a large number of people were taking. The pathway was "just a field" that everybody was using to get to the parking lot. Claimant stated: "As I was walking down the path, I don't know what happened. I just—all I heard was a pow and I slipped and I was on the ground just bip bip." Claimant testified that it had not rained the day of his fall, but there was water in the hole in which he fell. The area where he fell was right off of the midway which was lit up but it "was dim through this field, but you could see." The hole was 4 to 6 inches deep and was entirely filled with water. The Claimant was taken to a local hospital and then by ambulance to Belleville Memorial Hospital where he was examined by Dr. Hurd. Two and one-half days later Claimant underwent surgery to repair a broken ankle. Claimant was discharged from the hospital three days later. Claimant was in a cast for nine weeks and he was off work approximately 13 weeks. Claimant's medical bills totaled $6,956.03.

Roger Knapp testified on behalf of Claimant. Mr. Knapp was a concessionaire and for many years had a concession trailer at the Du Quoin State Fair. On August 29, 1987, Mr. Knapp observed the Claimant on the ground after the accident. Mr. Knapp and his wife were going to their car along a common pathway that had been used for years. He further observed that the ground near where Claimant fell was "really rough." Mr. Knapp testified that Claimant's foot was lying in the hole. Mr. Knapp

described the hole as being grassy with no dirt around the hole. The witness also stated that the hole was "maybe 18 inches by 2 foot or maybe it was, you know, 24 by 24, something like that" and it looked to be 4 to 5 inches deep. The hole did not appear to have been dug. There were tire tracks around the area. The location was the southwest corner of the carnival. Trucks that are quite heavy set heavy carnival rides down in this location. Also mobile homes are parked in the area. There were no state workers prohibiting individuals from utilizing the field and there were no barricades or posted restrictions. The area was commonly used by the general public as a means of ingress and egress to and from the fairgrounds. The area where the Claimant fell was not a parking lot but was the southwest corner of the midway. There was a parking lot across the street on the fairgrounds. The parking lot and the walkways are grassy. The hole was not obvious.

Mr. Knapp does not know how the Claimant fell as he did not observe the actual fall. Mr. Knapp testified that there are holes in this area every year but he could not testify as to how long the particular hole in question had been there. Mr. Knapp also testified that there were many state workers in the area.

Claimant testified that he had "maybe a beer or two" while he was at the fairgrounds.

Claimant was off work due to his injuries approximately 13 weeks. In addition to the medical costs, Claimant spent $68 on special shoes. Claimant testified that it was painful for him to be on his feet at work and that his ankle still bothers him in the spring when it is damp and the weather changes. At the time of the trial, Claimant continued to take Tylenol in the morning and evening and can no longer walk 18 holes of golf and enjoy himself.

During 1987, Claimant earned $11,000 in income for 16 weeks of employment or an average of approximately $695 per week gross. He lost 13 weeks of employment due to the injury. Claimant received $1,172 from the Railroad Unemployment and Sickness Board which must be repaid from any award and Union Supplement Pay of $2,500. Claimant testified that the $2,500 must also be reimbursed. Claimant's health insurer must also be reimbursed to the extent of Claimant's recovery. Claimant testified that the injury had slowed him down and on damp days or cold winter days his ankle bothers him. On cross-examination, Claimant testified that the $2,500 payment he received from the Railroad Retirement Board was in connection with his being unemployed during 1987 for six months. This testimony contradicted his earlier testimony on direct examination and the contradiction was not explained.

The Law

The State owes a duty of care to the users of its parks to reasonably maintain the premises. (*State Farm Mutual Automobile Insurance Co. v. State* (1992), 44 Ill. Ct. Cl. 265.) The State is not an insurer of the safety of persons who visit its parks. (*Heimann v. State* (1977), 32 Ill. Ct. Cl. 111.) In order for a Claimant to recover upon a theory of negligence, he must prove by a preponderance of the evidence that the State has breached its duty of reasonable care, that the breach was a proximate cause of the Claimant's injuries, and that the Claimant was damaged as a result of the negligence. The Claimant must also establish that the State had either actual or constructive notice of an alleged defect or dangerous condition before recovery is allowed. (*Dunbar v. State* (1992), 45 Ill. Ct. Cl. 175.) Invitees to State parks assume the normal and obvious risks attendant to the use of the premises. (*Gower v. State* (1994), 46 Ill. Ct. Cl. 434.) Claimant voluntarily walked

through a grassy area used by heavy trucks and mobile homes. The area was not significantly lighted. This was not a walkway designed by Respondent but an area routinely used by fairgoers as a means to enter and leave the park. Claimant assumes a risk in entering this area after imbibing some alcohol at night. More importantly, Claimant has failed to present any evidence to establish that the State had actual or constructive notice of this alleged defect. To create a duty for the State to seek out every four to six inch depression in state parks where invitees may walk even outside of walkways would be to make the State an insurer of the safety of all those who use its parks. The case law is consistent that the State has no such burden.

It is the burden of the Claimant to prove actual or constructive notice of this alleged dangerous or defective condition to prove the State's negligence. The record is devoid of such evidence. The general assertion that there may be holes in some area over time does not create constructive notice of the hole in which Claimant fell. Having failed to meet his burden of proof, we are constrained to deny this claim.

For the foregoing reasons, it is the order of the court that Claimant's claim be and hereby is denied.

(No. 90-CC-3402—Claim denied.)

RICHARD BLAKELY, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed August 7, 1996.

MATTHEW J. MAURER, for Claimant.

JIM RYAN, Attorney General (CHAD D. FORNOFF, Assistant Attorney General, of counsel), for Respondent.

NEGLIGENCE—*State not insurer of invitees on its property—reasonable care.* The State is not an insurer of invitees on State property and must only exercise reasonable care for the safety of invitees.

SAME—*what Claimant must prove.* To prevail in a negligence claim, the Claimant has the burden of proving by a preponderance of the evidence that the State breached its duty of reasonable care, that the breach was the proximate cause of the Claimant's injuries, that the Claimant was injured as a result of the negligence, and that the State had actual or constructive notice of the alleged defect.

SAME—*quadriplegic injured when thrown from wheelchair—burden of proof not met—claim denied.* A quadriplegic's claim seeking damages for injuries sustained at a State park when he was thrown from his wheelchair after the device went over the edge of a sidewalk and down a hill was denied, since the walkway was not a defective condition per se, and the Claimant presented no evidence that the State had actual or constructive notice that the sidewalk constituted a dangerous condition.

OPINION

FREDERICK, J.

Claimant, Richard Blakely, filed his complaint in the Court of Claims on January 19, 1990. His claim sounds in tort. Claimant seeks recovery for injuries he received at the Pere Marquette State Park when his wheelchair went over the sidewalk and down a steep hill where it struck a steel post. Claimant alleges the State knew or should have known that the sidewalk in question was unsafe because it did not have guard rails, fences or protective railings. Claimant seeks damages in excess of $15,000.

The court has carefully reviewed the testimony and exhibits and the court has considered the briefs and arguments of counsel.

The Facts

On June 22, 1989, the Claimant, Richard Blakely, was employed as the Executive Director at the Illinois Springfield Center for Independent Living in Springfield, Illinois. The purpose of that organization is to advance the rights of individuals with disabilities in the community.

On June 22, 1989, Claimant was at Pere Marquette State Lodge in Grafton, Jersey County, Illinois, for a meeting of the various centers of independent living located in the State of Illinois. The meeting was scheduled for two days with the participants staying overnight at the lodge. There were other individuals with disabilities at the meeting, including those being confined to a wheelchair, who attended this meeting. The lodge and grounds had been publicized as being accessible to the disabled and this was a fact that was relied upon in selecting the Pere Marquette State Lodge facility for the meeting. The lodge's brochure states that all areas of the lodge allow for handicap access.

At approximately 12:30 p.m. on June 22, 1989, the individuals at the meeting broke for lunch. At that time, the Claimant and another individual decided they would look around the area and get some fresh air. They went to an area near the tennis courts. The Claimant had never been at the facility before. The Claimant is a quadriplegic who has been in a manual wheelchair for the past nine years. The Claimant testified he has never experienced problems in the past in maneuvering and traveling in his manual wheelchair. The Claimant went over a bridge eastbound and then was returning to the lodge. The Claimant was going westbound over the bridge near the tennis courts after having previously traveled the same route in the opposite direction. Claimant started to make a 90 degree turn in the area where the sidewalk slopes toward a large hill. At the bottom of the hill there was a tree with steel posts around it. There was no other way by which Claimant could return to the lodge other than the one taken by the Claimant. The Claimant attempted to stop his wheelchair from rolling over the sidewalk by grabbing the pegs on the side of his wheelchair. He attempted to put his hand in the wheel to stop his descent down the hill and he attempted to apply the brakes on his

wheelchair. As soon as the Claimant's front wheels went over the edge of the sidewalk, his wheelchair picked up speed as it went down the hill. The Claimant collided with the steel posts around the tree. Upon impact, the Claimant was thrown from his wheelchair and landed in a nearby parking lot approximately five to six feet away.

At the end of the sidewalk where the Claimant's wheelchair left the walkway there were no railings, bushes or other type of guard rail. The hill slopes down 10 to 12 feet from the sidewalk to the steel posts. The change in elevation from the sidewalk to the area of the steel posts is approximately 15 feet.

The Claimant was assisted back into his wheelchair by an individual at the park. Due to his disability, he did not realize that his leg was broken. The Claimant did feel a pressure in his leg, was sweating profusely, and was having muscle spasms and headaches. Claimant's leg would not stay straight and was sticking out to the right. The Claimant left the conference early and returned to his home in Springfield, Illinois. He experienced difficulty and pain in driving home. After he arrived home, the Claimant's mother called 911 due to Claimant's condition and he was transported by ambulance to Memorial Medical Center.

The Claimant's leg was broken in two places. One break was above the knee and the other one below the knee. This condition is called a floating knee. He was hospitalized from June 22, 1989, through June 24, 1989. Claimant was readmitted from June 28, 1989, through July 1, 1989. His leg was put in a cast.

Due to the accident, Claimant suffered numerous damages. Claimant believes he developed bladder infections because he was unable to empty his leg bag due to his cast. In addition, he lost approximately $1,500 in salary due to 14 days of missed work as a result of the

medical problems he experienced. Since the Claimant had to keep his cast dry, he was unable to shower. He experienced great difficulty in washing his hair. Claimant could not push his wheelchair and was required to use an electric wheelchair. His leg was placed in a cast for approximately six weeks and then replaced by a knee brace. The Claimant had difficulty sleeping and was unable to drive which substantially impaired his mobility.

The Claimant incurred medical bills for his two hospital stays in the amount of $2,880. The bills for the two hospital stays were $1,210.49 and $1,680.52, respectively.

On the date of the accident, Pere Marquette State Park in Jersey County, Illinois, was under the care and control of the Illinois Department of Conservation.

Claimant was reimbursed for his meal expenses through a travel voucher with his agency. Worker's compensation insurance was available through Claimant's employer agency but Claimant did not file a worker's compensation claim for his injuries. Claimant arrived at the park on the morning of June 22, 1989, and did not pay an admission fee to enter the park itself.

After Claimant's first stay in the hospital, he claims he contracted a bladder infection. This was not diagnosed by any physician and no drugs were prescribed for this infection.

Claimant's second hospitalization from June 28, 1989, to July 1, 1989, was entirely related to the use of a sulfa drug. Claimant took a sulfa-based drug between the time of his first and second hospitalizations. Claimant took a sulfa-based tablet, having forgotten that he was allergic to sulfa. As a result of this self-treatment with sulfa drugs, Claimant developed a serious reaction and was rehospitalized.

The Law

The State owes a duty of reasonable care to the users of its parks. (*State Farm Mutual Automobile Insurance Co. v. State* (1992), 44 Ill. Ct. Cl. 265.) The Claimant was injured while at Pere Marquette State Lodge near Grafton, Illinois. This park was under the care and control of the Illinois Department of Conservation. There is no question that Claimant received severe injuries as the result of his crash into the steel post.

The Respondent has raised the following issues in opposition to the claim. The Respondent argues that Claimant failed to exhaust his other remedies by failing to file a workers' compensation claim with his employer since he was at a business meeting. Claimant believed that there may have been a workers' compensation claim through his employer. The Respondent has also raised that the Recreational Use of Land & Water Areas Act (745 ILCS 65/1 *et seq*.) applies under the facts of this case and the State would only be liable if the State's conduct were a willful and wanton failure to guard or warn Claimant against a dangerous condition. Claimant admits Respondent's actions were not willful and wanton.

We need not resolve the foregoing two issues because the Court finds Claimant has failed to prove even a negligence claim against Respondent by a preponderance of the evidence. The Claimant went along a sidewalk and then went back the same way he had just come. He obviously did not observe any dangerous condition as he did not take any special precautions on the return route. The Claimant presented no evidence that the State had actual or constructive notice that the walkway constituted a dangerous condition. The State is not an insurer of invitees on State property. The State must only exercise reasonable care for the safety of invitees. (*Fausch v. Board of*

Trustees of the University of Illinois (1989), 42 Ill. Ct. Cl. 175.) The Claimant has the burden of proving that the State was negligent by a preponderance of the evidence. (*Hoekstra v. State* (1985), 38 Ill. Ct. Cl. 156.) In order for Claimant to prevail, he must prove by a preponderance of the evidence that the State has breached its duty of reasonable care, that the breach was the proximate cause of Claimant's injuries, that Claimant was injured as a result of the negligence, and that the State had actual or constructive notice of the alleged defect. *Dunbar v. State* (1992), 45 Ill. Ct. Cl. 175.

We have reviewed the record very carefully. There is no evidence of prior accidents or warnings to the State indicating that this sidewalk was defective. This sidewalk was not a defective condition *per se*. There was no expert testimony to indicate that this was an obvious dangerous condition. The Claimant has failed to meet his burden of proof because he has failed to prove the State was negligent. While we certainly sympathize with the Claimant because of his injuries, we must find that they were not caused by the State's negligence.

For the foregoing reasons, it is the order of the Court that this claim be and hereby is denied.

(No. 91-CC-2119—Claimant awarded $300.)

WINSTON L. M. SENOR, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 16, 1997.

WINSTON L. M. SENOR, *pro se*, for Claimant.

JIM RYAN, Attorney General (JULIE A. SMITH, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*exhaustion requirement—inmate exhausted available remedies where identity of tortfeasor was unknown.* The Court of Claims Act requires that, before a Claimant may file a claim, he shall exhaust all other remedies and sources of recovery whether administrative or judicial, but where the Claimant inmate did not know the identity of the person who forged his name in order to receive funds from the Claimant's prison trust account, the Claimant could not pursue another remedy, and he exhausted his available remedies before proceeding with his claim against the State.

PRISONERS AND INMATES—*State's duty with regard to inmate's bailed property—when presumption of negligence arises.* The State has a duty to exercise reasonable care to safeguard and return an inmate's property when it takes actual physical possession of such property, and the loss of bailed property while in the possession of a bailee raises a presumption of negligence which the bailee must rebut by evidence of due care.

SAME—*funds taken from inmate's trust account—State did not rebut presumption of negligence—award granted.* Where the State deducted $300 from an inmate's prison trust account at the request of an unidentified prisoner who forged the inmate's signature and asked that the money be forwarded to a third person, a presumption of negligence arose on the part of the State and, since no evidence was offered to rebut the presumption, the inmate was awarded $300 in satisfaction of his claim.

OPINION

SOMMER, C.J.

In this claim it is alleged that the Respondent negligently took $300 from the Claimant's trust fund account at the Menard Correctional Center due to the forgery of an unknown inmate and sent the money to a third party without the Claimant's permission.

The Claimant filed a grievance with the Menard Correctional Center Institutional Inquiry Board, which found that the Department of Corrections failed to investigate the Claimant's complaint; that the Board would assume the money was disbursed due to staff negligence; and that the Board would recommend that the Claimant be reimbursed in the amount of $300. Warden James H. Theiret concurred. However, the tort claims coordinator for the Department declined to approve the reimbursement because the coordinator found that the Claimant

failed to substantiate that the loss was the result of direct staff negligence. Department personnel later recommended that the Claimant pursue his claim in the Court of Claims.

A hearing was held by the Commissioner on May 7, 1996. The evidence presented at the hearing consisted of testimony from the Claimant and testimony from Christine Bowles, Trust Office Supervisor at the Menard Correctional Center. The Claimant waived the filing of a brief. The Respondent filed a brief on July 15, 1996.

The facts of this case are not disputed. An unknown inmate, using the Claimant's name, filled out a voucher requesting the transfer of $300 from the Claimant's trust fund account to an individual identified as Katie Granberry. The amount was deducted from the Claimant's account. About a week later, when the Claimant went to the commissary, he discovered that the money was taken from his trust account. The Claimant attempted to reach Katie Granberry via letter, but received no response. The identity of the inmate who forged the Claimant's name has never been learned. Christine Bowles, the Trust Office Supervisor, testified that the system in place at that time for verifying vouchers was "really pretty poor."

Section 25 of the Court of Claims Act requires that, before a Claimant may file a claim, he shall exhaust all other remedies and sources of recovery whether administrative or judicial. (705 ILCS 505/25.) The Respondent's only argument is that the Claimant failed to exhaust his remedies in compliance with the Act.

It is the finding of this court that the Claimant did exhaust his remedies. The Respondent argues that the Claimant failed to exhaust his remedies by failing to sue Katie Granberry. As authority for this proposition, the

Respondent cites *Doe v. State* (1991), 43 Ill. Ct. Cl. 172, in which this court granted a motion to dismiss the complaint of a patient of a State mental health facility who was assaulted by another patient because the Claimant failed to sue the other patient. *Doe* is inapposite to the case at bar. The Claimant in *Doe* was able to identify the party who committed the tort, leaving no bar to a suit against that party. In the instant case, the tort feasor was not Katie Granberry. She may have received the money, but she did not forge the Claimant's name and defraud the Claimant and the Department. Because the identity of the tort feasor is unknown, the Claimant is unable to pursue a legal or equitable remedy against the tort feasor. Furthermore, the Claimant did attempt to investigate the forgery by attempting to contact Katie Granberry.

Although the Respondent does not argue directly that the Claimant failed to exhaust his administrative remedies within the Department, it does cite a case as authority or such an argument. The Respondent cites *Watkins v. State* (1992), 45 Ill. Ct. Cl. 203. The underlying facts in *Watkins* are similar to the case at bar. However, the Claimant in *Watkins* failed to appeal an adverse ruling by the Institutional Inquiry Board. Here, the Claimant received a favorable ruling from the Board and from the warden, which the tort claim coordinator declined to approve. The Claimant was then advised by departmental personnel that his next step was to file a complaint with this Court. These facts make the instant case distinguishable from *Watkins*.

Turning to the substantive issues of the complaint, this Court has held that the State has a duty to exercise reasonable care to safeguard and return an inmate's property when it takes actual physical possession of such property. (*Harris v. State* (1994), 46 Ill. Ct. Cl. 190; *Gammons v.*

State (1981), 35 Ill. Ct. Cl. 271; *Doubling v. State* (1976), 32 Ill. Ct. Cl. 1.) Furthermore, the loss of bailed property while in the possession of a bailee raises a presumption of negligence which the bailee must rebut by evidence of due care. *Harris v. State* (1994), 46 Ill. Ct. Cl. at 193.

In the instant case, the Claimant has shown that the Respondent was in actual physical possession of his property—the $300 in the trust fund account. Therefore, there is a presumption of negligence by the Respondent unless the Respondent rebuts this presumption by evidence of due care. The Respondent did not offer evidence to rebut the presumption. In fact, Christine Bowles, the Trust Office Supervisor, testified that the system was "really pretty poor."

It is therefore ordered that the Claimant is awarded $300 in full and complete satisfaction of this claim.

(No. 93-CC-0521—Claim denied.)

ALI HASSEN, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1997.

ALI HASSEN, *pro se*, for Claimant.

JIM RYAN, Attorney General (DIANN K. MARSALEK and JENNIFER LINK, Assistant Attorneys General, of counsel), for Respondent.

PRISONERS AND INMATES—*formulation of policy regarding movement of prisoners between buildings—administrative discretion.* The decision to require inmates to move between buildings only after obtaining authorization is within the administrative discretion of prison officials, and complaints challenging this administrative discretion fail to state a claim upon which relief can be granted by the Court of Claims.

SAME—*brief detention of inmate walking to prison health care unit without authorization—claim denied.* Where an inmate was briefly detained and

questioned by prison officials when he left the prison library without authorization and walked toward the prison health care unit to seek treatment for an asthma attack, the inmate failed to state a claim upon which relief could be granted, nor did he prove that he suffered any measurable damages due to enforcement of the prison policy restricting movement without authorization.

OPINION

MITCHELL, J.

Claimant is an inmate with the Illinois Department of Corrections who was incarcerated at Dixon Correctional Center in Dixon, Illinois, at all times relevant to his claim. In 1985, five years prior to his incarceration, Claimant was first diagnosed as having asthma. Since that time, Claimant has received periodic treatments for asthma.

In his complaint and at a hearing conducted by a commissioner of this court, Claimant alleged that on September 26, 1991, he suffered an asthma attack while in the hallway near the prison library. Claimant left the building without a pass and waled toward the prison health care unit, apparently quite a distance from the library. On his way to the health care unit, Claimant was detained by correctional officers and questioned about where he was going and his authority to be going there. Claimant alleges that 12 minutes after he left the library, two additional officers, Lieutenant Burge and Captain Dempsey, detained Claimant and questioned him as to where he was going. These officers gave Claimant several direct orders to stop, and Claimant did eventually stop. After a brief exchange with those two officers, Claimant alleges that he was driven to the Health Care Unit in a vehicle used by prison staff, treated, and sent back to his housing unit.

Claimant testified that he attempted to tell the officers where he was going and did not use offensive language. Witnesses for the Respondent testified that Claimant was evasive with his answers and used offensive

language. The following day, Claimant was given disciplinary reports for, among other things, unauthorized movement and insolence. These reports were heard at an adjustment committee hearing where Claimant was found guilty and disciplined with two weeks' loss of library and commissary privileges.

At the hearing before a commissioner of this Court, Respondent produced witnesses who testified that the Claimant left the library without a pass and without authorization. Claimant disagreed with the witnesses presented by Respondent about the necessity of a pass or authorization in emergent situations, such as an asthma attack, and disagreed about Claimant's use of offensive language.

The jurisdiction of this Court is limited by statute as found in section 8 of the Court of Claims Act. (705 ILCS 505/8.) The decision to require inmates to move between buildings only after obtaining a pass or receiving permission is within the administrative discretion of Dixon Correctional Center. Complaints challenging this administrative discretion fail to state a claim upon which relief can be granted by this Court. *Holmes v. State* (1978), 32 Ill. Ct. Cl. 275.

Furthermore, Claimant has failed to show that he suffered any measurable damage as a result of the enforcement of this policy. The Claimant has the burden of proving his damages and in the absence of such proof, no award may be entered. (*Harris v. State* (1989), 41 Ill. Ct. Cl. 184; *Jackson v. State* (1992), 45 Ill. Ct. Cl. 314.) Claimant has not alleged, let alone proven, that he received inadequate medical treatment or that the brief detentions by prison staff caused him harm in any measurable manner.

Accordingly, it is hereby ordered that Claimant's claim be, and hereby is, denied and this case be closed.

(No. 93-CC-1262—Claim dismissed.)

JOHNNIE VEAL, Claimant, *v.* PAUL KLINCAR *et al.*, Respondents.

Order filed August 5, 1996.

Johnnie Veal, pro se, for Claimant.

Jim Ryan, Attorney General (Donald C. McLaughlin, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*claim alleging Prisoner Review Board acted arbitrarily dismissed for lack of jurisdiction and failure to exhaust remedies.* An inmate's claim alleging that the Prisoner Review Board acted arbitrarily and beyond its legal authority was dismissed, since the Court of Claims Act does not confer jurisdiction on the Court of Claims to hear decisions of the Prisoner Review Board, the Claimant did not pursue the proper avenue of review which was a request for rehearing under the Illinois Administrative Code, and he failed to exhaust his administrative remedies as mandated by the Court of Claims Act.

ORDER

PATCHETT, J.

This matter coming to be heard on the motion of Respondent to dismiss the claim herein, and it appearing to the Court that Claimant has received due notice, and the Court being fully advised in the premises:

1. When Claimant was an inmate at the Sheridan Correctional Center, he brought this complaint in tort against Paul Klincar and the Illinois Prisoner Review Board, including present and/or past Prisoner Review Board members. Claimant was convicted of a crime and sentenced on January 31, 1972.

2. Claimant appears to allege that the Prisoner Review Board arbitrarily acted beyond its legal authority by applying a three-year appearance date to the Board for Claimant and later applying section 1003—5(f) of the Unified Code of Corrections (Ill. Rev. Stat. ch. 38, par. 1003—5(f)) to this action, subjecting Claimant to endure

an *ex post facto* condition. Based on the Prisoner Review Board's actions Claimant alleges the Respondents caused severe mental and emotional distress, and physical and psychological humiliation to Claimant. As a result, Claimant prays this Court enter a judgment against the Respondents and for the Claimant for a total sum of $830,000.

3. The Illinois Court of Claims is a court of limited jurisdiction. (See 705 ILCS 505/5 (1992).) The Claimant's complaint is based on a decision of the Prisoner Review Board, which Claimant alleges acted arbitrarily and beyond its legal authority. The Court of Claims Act does not confer jurisdiction on the Court of Claims to hear decisions of the Prisoner Review Board. Furthermore, the Prisoner Review Board does not provide a mechanism for a review/appeal of its decisions to the Illinois Court of Claims.

4. The Prisoner Review Board's procedures for requesting a rehearing of a decision regarding parole are quite specific. Title 20, Ch. IV, Section 1610.100 of the Illinois Administrative Code provides:

"(1) A rehearing will be granted only by the affirmative action of the Board in conference.

(2) After a parole is denied, a rehearing may be requested by the person who was denied parole or another in his behalf. Such request must be made in writing and must set forth new facts or extraordinary circumstances which could not have been known to the parole applicant at the time of his interview by the Board member, or new facts or extraordinary circumstances which have arisen subsequent to the time of the interview, or both, which have not been previously considered." Title 20, Ch. IV, Section 1610.100 Illinois Administrative Code.

5. This is the proper recourse of review available to the Claimant. Claimant has not requested a hearing. Thus, jurisdiction to entertain this matter does not lie in the Court of Claims. In addition, by filing a claim in the Court of Claims and not petitioning for hearing according to the rules established by the Prisoner Review Board,

the Claimant has failed to exhaust his administrative remedies as required by section 790.60 of the Court of Claims Regulations (74 Ill. Adm. Code 790.60) and section 25 of the Court of Claims Act (705 ILCS 505/25), which require that any person who files a claim in the Court shall, before seeking final determination of his claim, exhaust all remedies, whether administrative, legal or equitable.

6. Rule 790.90 of the Court of Claims Regulations provides that failure to comply with the provisions of 790.60 shall be grounds for dismissal.

Wherefore, based on the Court of Claims' lack of jurisdiction to review decisions of the Prisoner Review Board, or, in the alternative, Claimant's failure to exhaust available remedies, Respondents respectfully move this court to enter an order dismissing Claimant's claim with prejudice.

It is hereby ordered that the motion of Respondent be, and the same is, hereby granted, and the claim herein is dismissed, with prejudice.

(No. 93-CC-1952—Claim denied.)

NEW DIVISION-CLYBOURN CURRENCY EXCHANGE, INC., Claimant, *v.* THE STATE OF ILLINOIS, DIXON CORRECTIONAL CENTER–INMATE TRUST FUND, Respondents.

Order filed August 28, 1996.

IRA NEVEL, for Claimant.

JIM RYAN, Attorney General (JOEL CABRERA, Assistant Attorney General, of counsel), for Respondent.

EXHAUSTION OF REMEDIES—*Claimant must exhaust all other remedies.* Section 25 of the Court of Claims Act requires any person who files a claim to exhaust all other remedies and sources of recovery.

PRISONERS AND INMATES—*claim by currency exchange for value of forged check denied—other remedies not exhausted.* In a claim by a currency exchange alleging that the State wrongfully refused to reimburse it for the value of a $500 check drawn on an inmate trust fund account after the Claimant cashed the check for a third party endorser but was unable to collect the funds from the bank because a stop payment order had been issued, the claim was denied due to the Claimant's failure to exhaust its remedies against the bank which had indicated that it would cash the check, and the check's endorser.

ORDER

MITCHELL, J.

This cause comes before the court on a verified complaint filed by Claimant, New Division-Clybourn Currency Exchange, Inc., alleging that Respondent, State of Illinois, wrongfully refuses to reimburse Claimant for the value of a $500 check. The Claimant contends that it is a holder in due course, pursuant to section 3—302 of the Uniform Commercial Code. (810 ILCS 5/3—302.) In addition to the value of the check, Claimant seeks reasonable attorney's fees in the sum of $350, pursuant to section 17—1a of the Criminal Code of 1961 (720 ILCS 5/1a) and seeks interest at the rate of 9%, pursuant to section 2 of the Interest Act. 815 ILCS 205/2.

A hearing was conducted on March 31, 1995, at which one witness, Marty Nevel, the president of Claimant, was presented. Claimant referenced four exhibits and Respondent presented one exhibit, the department report.

I. Claimant's Case in Chief

Mr. Nevel testified that the normal procedures regarding check cashing is to make sure the person presenting it must be on Claimant's files by means of a signature card. If the person is unfamiliar, then Claimant verifies the check usually with the bank to verify if there are funds available or stop payments.

In this instance, Claimant registered the payee, Dekota Short. He identified Claimant's Exhibit No. 1 as a check drawn from the Dixon Correctional Center made payable to Dekota Short for $500 dated August 14, 1992. The check was cashed by Claimant.

Mr. Nevel identified Claimant's Exhibit No. 2 as the signature card completed by Dekota Short and verified by a Public Aid identification card dated August 21, 1992. The signature on her identification card matched the signature on the check and on the signature card. He identified Claimant's Exhibit No. 3 as a copy of the Claimant's telephone bill showing a telephone call to the Dixon National Bank on August 21, 1992. The bank confirmed that there were no stop payment orders and that there were sufficient funds in the account. Claimant charged Dekota Short $6.90 as a service charge. Claimant verified the signatures on the check.

The check was returned to Claimant on August 26. After the check was returned, he had a conversation with Sally Brady, the Business Administrator for Dixon Correctional Center (hereinafter "DCC").

On cross-examination, Mr. Nevel acknowledged that Claimant has not filed a suit to collect the $500 from the bank.

II. Respondent's Case in Chief

Respondent offered its department report, pursuant to section 790.140 of the Court of Claims Regulations. (Respondent's Exhibit No. 1.) Claimant objected. The Court admits pages 3 through 12 into evidence.

III. Rebuttal Testimony by Claimant

Mr. Nevel was recalled to present testimony in rebuttal to Respondent's Exhibit No. 1. He stated that Sally Brady of DCC informed him that a stop payment had

been placed on the check because the signatures on the check requested form had been forged. Apparently the signatures of an inmate and the assistant warden were forged on the request form. The funds were to come from an inmate's account. After the check was mailed, DCC discovered the mistake and placed a stop payment. Mr. Nevel indicated that he would have never cashed the check had he been told that a stop payment had been placed on it.

IV. Argument of the Parties

On the merits, Claimant argues that the Respondent's evidence does not prove that the inmate's signature was forged. The Respondent put the check into the stream of commerce and Claimant was a holder in due course, subject only to real defenses which are not present in this case. Claimant had no duty to call the bank. In the alternative, Claimant argues that the Respondent was negligent.

The Respondent argues that the Claimant has failed to exhaust its remedies pursuant to section 790.60 of the Court of Claims Regulations. (74 Ill. Adm. Code 790.60.) Section 25 of the Court of Claims Act requires any person who files a claim to exhaust all other remedies and sources of recovery. (705 ILCS 505/25.) Claimant did not file suit against the bank or the endorser, Dekota Short. The documents show that a stop payment order was placed on August 19, 1992, two days before the check was presented to Claimant. Respondent argues that attorney's fees, costs and interest are not recoverable against the State unless specifically authorized by statute.

Claimant waived its opportunity to file a brief; however, the Respondent requested time to file a brief. No briefs have been received.

V. Conclusion

It appears from the record that the check in question is not a State warrant drawn on the State Treasury. It is drawn on an Inmate Trust Fund account held at Dixon National Bank. Mr. Nevel testified that he called the bank on August 21, 1992, when Dekota Short presented the check prior to cashing it and was not told anything by the bank that caused him to believe the check would not be honored. The record indicates that a stop payment order was in place maybe as early as August 19.

The threshold question is whether Claimant must proceed against other parties prior to seeking recovery from Respondent. Based upon Mr. Nevel's testimony, the Court finds that the bank was in error in responding to Mr. Nevel that it would honor the check. Nothing in the record indicates whether Claimant has sought recovery against Dekota Short or the bank.

The Court finds that Claimant is required to exhaust remedies or recoveries against all other persons before proceeding against Respondent. Therefore, the claim is denied.

(No. 94-CC-2267—Claim dismissed;
petition for rehearing denied.)

RICHARD BLACK, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed April 11, 1996.

Order on Petition for Rehearing filed August 5, 1996.

RICHARD BLACK, *pro se*, for Claimant.

JIM RYAN, Attorney General (JAMES DORAN, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*existence of contract must be established in breach of contract claim.* In order to prove breach of contract, a Claimant has the burden of proving by a preponderance of the evidence that a contract was in existence.

SAME—*inmate barred from college class conducted at prison—existence of contract not proven—claim dismissed.* Where the Claimant, an inmate at a correctional facility, sought damages for breach of contract alleging that a State university withdrew his enrollment in a college sociology class without affording him procedural safeguards, the claim was dismissed based on the Claimant's failure to show the existence of a contract, because there was no proof adduced with regard to contractual terms, no consideration was paid by the inmate, and he did not establish the facts surrounding his removal.

OPINION

RAUCCI, J.

This cause comes before the Court on Claimant Richard Black's complaint seeking damages in the sum of $500,000 for breach of contract by Respondent State of Illinois. Claimant alleges that Illinois State University (hereinafter ISU) withdrew his enrollment in a class, Sociology 210, without authority and without affording him procedural safeguards. The complaint states that ISU discriminated against Claimant "an African American by involuntarily withholding his enrollment in Sociology 210 for participating in robust discussions with David Eaton, a white."

A hearing was conducted on April 13, 1995, at which Claimant appeared and testified. Mr. Black stated that he was enrolled in Sociology 210 and was forced to withdraw without procedural safeguards. The instructor had presented a three-dimensional depiction of health. After the instructor asked for criticism, Claimant said "that it sounded like hogwash." The class was conducted by ISU at Pontiac Correctional Center (hereinafter PCC). He did not pay any fees or other money in relation to the course.

Claimant stated on cross-examination that the incident took place in February 1989, and that he graduated

from ISU in December 1993. He filed a grievance with the Student's Judicial Office at ISU. He was told that he was removed from the class by prison officials. The decision was appealed pursuant to appeal procedure at ISU and was affirmed in the fall of 1990. ISU denied any responsibility for the withdrawal. Claimant believes the instructor had him removed from the list. Later, Will Davis, an employee of ISU and a class coordinator at PCC told Claimant that he could no longer attend the class. He told Claimant that he was intimidating his instructors. He was attending the class and another one in communications. Claimant indicated that Mr. Davis attempted to have him removed from the communication class, but after some discussion he remained.

Claimant believes that this is a case of discrimination because he had had a heated discussion with Dwight Brooks, the African American instructor of the communication course, but was not removed from that class. The instructor of Sociology 210, David Eaton, is white.

Claimant argued that he was not afforded any procedural safeguards. The ISU catalog specifies that any instructor observing or suspecting misconduct of a student must first read the student a statement of rights. This was not done. If the problem cannot be resolved informally, then the instructor is to write a formal disciplinary report. The student handbook specifies that a student is not to be removed from a class or denied permission to attend unless his attendance would endanger life or property. Claimant did not have a copy of the student catalog or the student handbook with him.

Claimant argued that the Illinois School Code provides that the Illinois Department of Corrections (hereinafter Department) is in control of the school room and only the department can say who is admitted, not ISU.

He requested damages in the sum of $25,000 because an educational opportunity was withdrawn from him and his rights were violated.

The departmental report was made a part of the record. The record was left open to allow Claimant to provide a copy of his grievance letter from ISU, a copy of the student handbook and the pertinent provisions of the School Code.

Claimant cites sections 13—43.11 and 13—43.12 of the Illinois School Code (105 ILCS 5/13—43.11 and 5/13—43.12), for the purpose of demonstrating that only the Department had the authority to remove him. An October 27, 1989, letter addressed to Claimant indicated that the Student Grievance Committee denied his grievance. The letter, signed by the Acting Associate Director of the Student Judicial Office Annex or ISU, also stated that:

> "The investigating team found that the decision to bar you from the classroom was punishment established by the correctional institution. Professor David Eaton did not request that you be removed from the class nor did he participate in the decision to bar you from any future courses."

In a November 1, 1989, letter to the Student Code Enforcement and Review Board, Claimant appealed the denial of his grievance. He stated that Professor David Eaton did point the accusing finger at him and supplied misinformation about his conduct in class. The letter states that the Committee's finding that the decision to exclude him was made by the Department was incorrect because Wilbert Davis, an ISU advisor and supervisor, stated that he made the decision to exclude Claimant, based upon an accusation by Eaton. He stated that the Committee ignored that he was also enrolled in a communication class but was only prevented from attending Eaton's class. He complained that the Committee did not interview him or Mr. Davis.

In a January 8, 1990, letter to Claimant, the president of ISU indicates that the appeal was denied by the Review Board.

The provisions of the handbook appear to establish a Student Code of Conduct and indicates that ISU applies disciplinary sanctions for violations of expressed regulations. The procedures to be followed when a student is charged with violations of the expressed regulations are stated.

Respondent has not filed a brief. Respondent filed a departmental report that is hundreds of pages in length and contains numerous documents that are not relevant and is not organized in any fashion, i.e., chronologically. The report is of no assistance in determining this case. Respondent has not enunciated its positions.

In order to prove his breach of contract complaint, Claimant has the burden of establishing by a preponderance of the evidence that a contract was in existence. (*Hanifi v. State* (1993), 46 Ill. Ct. Cl. 131, 141.) The Claimant has failed to establish the existence of a contract between him and ISU. There are no documents in the record that could be interpreted as providing the terms of a contract between Claimant and ISU. Claimant's testimony, that he did not pay any fee or money to attend the Sociology 210 class, indicates that no consideration was provided by Claimant for the right to attend the class.

Claimant did not provide any statutory citations or other legal authority to indicate that he possessed contractual rights in relation to the class. Claimant has not established the facts of his removal, nor has he provided any documents that ordered or directed him to be removed from the class. We are constrained to deny Claimant's claim.

It is therefore ordered, adjudged and decreed that this claim is dismissed and forever barred.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Claimant's petition for rehearing, the Court being fully advised in the premises, the Court finds:

The petition for rehearing should be denied.

It is therefore ordered that the Claimant's petition for rehearing is denied.

(No. 94-CC-2555—Claim denied.)

SHEFSKY & FROELICH, LTD., Claimant, *v.*
THE STATE OF ILLINOIS, Respondent.

Order filed June 29, 1994.
Opinion filed April 29, 1997.

SHEFSKY & FROELICH, LTD., *pro se*, for Claimant.

JIM RYAN, Attorney General (MICHAEL ROCKS, Assistant Attorney General, of counsel), for Respondent.

CONTRACTS—*Purchasing Act—agreements to provide legal services for State must be in writing.* Pursuant to the Illinois Purchasing Act, agreements to provide legal services for the State must be reduced to writing and, if not, they are void.

SAME—*law firm had no written agreement to perform legal services for State—stipulation disapproved—claim denied.* Although the parties filed a stipulation agreeing to entry of an award for the Claimant law firm in its action seeking payment for legal services performed for the Department of Financial Institutions, the Court of Claims disapproved the stipulation and denied the claim because, notwithstanding that the record showed the formation of an otherwise valid oral agreement, that agreement, to which the State was a party, was rendered void under the Purchasing Act by the parties' failure to reduce it to writing.

ORDER

SOMMER, C.J.

Claimant Shefsky & Froelich, Ltd., a law firm, brought this claim seeking payment of $30,000 in legal fees and $286.67 in costs for representing the Respondent's Department of Financial Institutions (DFI) in a proceeding to determine where unclaimed tax refunds should be sent. Claimant alleged in its standard lapsed appropriation form complaint that demand for payment was made to DFI but the demand was refused on the grounds that the funds appropriated for the payment had lapsed. The Respondent filed a stipulation agreeing to entry of an award in the full amount sought. The claim is now before the Court for approval of the stipulation.

The Court is not bound by such stipulations and, based on the record herein, we cannot approve the one at bar.

The record indicates that the Claimant had no written contract with DFI to perform the services. For the same reasons that DFI could not make payment in the absence of a contract, the Court cannot make an award. Pursuant to sections 9.01 and 10 of the Illinois Purchasing Act (30 ILCS 505/9.01, 505/10), such agreements must be reduced to writing and if not then they are void. Failure to comply with the Illinois Purchasing Act in this instance also runs afoul of section 11 of the State Comptroller Act, 15 ILCS 405/11.

Thus, we are constrained by law to disapprove the stipulation. However, for purposes of possible further consideration of this matter by the General Assembly and in fulfillment of our responsibilities as an advisory body to the General Assembly we point out that the record indicates the following:

1. At the request of DFI, the Attorney General did appoint the Claimant Special Attorney General to handle the case.

2. DFI received $300,000 in unclaimed assets.

3. Billings in this claim spanned three fiscal years, including FY94, and DFI lapsed or had a projected lapse balance in a contractual line in excess of $1,000,000 in each of those years.

4. DFI has stated it would have made the payment had a contract been executed, and DFI has stated it agrees that this claim is valid.

5. Any appropriation to pay this claim should be made from Fund No. 054.

Wherefore, it is hereby ordered that the stipulation at bar be, and hereby is, disapproved.

OPINION

SOMMER, C.J.

The Claimant's complaint seeks $30,286.67 for services provided to the Department of Financial Institutions (DFI). A departmental report, dated April 5, 1994, agreed that this is a valid claim. On May 23, 1994, the Respondent filed a stipulation, agreeing to an entry of an award.

On June 29, 1994, this Court entered an order disapproving the stipulation. This Court found that the Claimant had no written contract with DFI to perform the services. Pursuant to sections 9.01 and 10 of the Illinois Purchasing Act, such agreements must be reduced to writing and, if not, they are void. (30 ILCS 505/9.01, 505/10.) The parties do agree that the Claimant provided the services claimed over the three fiscal years at the request of DFI and with the appointment by the Attorney General.

A hearing was conducted on October 17, 1996. The Respondent appeared through its counsel, Mr. Michael Rocks, Assistant Attorney General, and Mr. Howard A. Davis appeared on behalf of the Claimant. The parties waived the right to have a court reporter present and a transcript made. Mr. Davis had verified the complaint. He identified the 11 pages of group exhibit A and invoice for period through August 31, 1993, attached to the complaint. Mr. Davis testified that he either provided most of the services or was familiar enough with the services provided to know the billings accurately reflect the amount of time expended on behalf of the State.

The parties agreed that the Claimant would submit documents in support of its claim. The Respondent would then have the right to respond with the Claimant maintaining a right to reply.

The Claimant filed a letter, dated November 7, 1996, containing certain information and two additional documents. According to the Claimant, the services were provided to DFI in regard to the *Shapiro v. Barnett* litigation. The Claimant's letter indicates that $30,572 (differing from the $30,286.47 claimed in the complaint, exhibits, and stipulation) is claimed and can be separated by fiscal year as follows: (a) FY92—$10,146.50; (b) FY93—$15,846.59 and (c) FY94—$4,479. Attached to the Claimant's letter is a copy of a January 11, 1993, letter from Mr. Davis to the general counsel of DFI. The letter recounts a conversation the two had wherein the general counsel agreed that DFI would pay the Claimant a contingent fee of ten percent plus costs based on monies collected by DFI from the *Shapiro* case, for the services provided to DFI. The copy of the January 11, 1993, letter was not executed by the general counsel or anyone else on behalf of the Respondent. Also attached to the Claimant's letter is a March 15,

1993, interoffice memorandum. The Claimant's memorandum states that on March 11, 1993, the general counsel for DFI called to inform Mr. Davis that the Claimant would be paid for representing the Department on the 10% contingent fee basis set forth in the prior letter to the general counsel.

The Respondent did not file any letters, briefs or other written material. The Respondent has not disputed, and even agrees with, the facts as presented by the Claimant.

The record contains sufficient information to support a finding that an agreement was formed between the parties. It was an oral agreement, the terms of which are represented by the January 11, 1993, letter. In a suit involving parties other than the State of Illinois, such an agreement could be enforceable against both parties. However, the Illinois Purchasing Act (30 ILCS 505/9.01, 505/10) declares such "agreement" to be void. But for the statutory provisions, as previously cited by the Court, the Claimant would have an enforceable right. This Court, however, finds that the Claimant did provide the services and that the 10% contingent fee plus costs, supported by the number of hours of service indicated in the Claimant's document is reasonable in the amount of $30,286.67.

It is therefore ordered that this claim is denied. However, it is recommended that the Claimant present this claim to the General Assembly for consideration of payment. This Court has found that the Claimant did provide services to the State at the State's request and that such services are reasonably valued at $30,286.67. Any payment should be from the fund prefixed 054, and not from the general revenue fund.

(No. 94-CC-3084—Claim dismissed; petition for rehearing denied.)

JOHN T. O'CONNOR, Claimant, *v.* JOSEPH SMITH and THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS, Respondents.

Opinion filed March 8, 1996.

Supplemental opinion filed November 6, 1996.

ERWIN, MARTINKUS, COLE & ANSEL (JOHN M. WILKIE, of counsel), for Claimant.

FLYNN, PALMER & TAGUE, for Respondents.

JURISDICTION—*Court of Claims had no jurisdiction over common law libel claim against individual State employee acting outside official duties.* A State official's common law libel claim against another official in his individual capacity, alleging that the latter was acting outside his official government duties when he committed the libel, was dismissed for lack of subject matter jurisdiction, since sovereign immunity does not cover a tort claim against an individual who is sued on a duty that does not arise from his official status, and such claims are maintainable in the circuit court rather than the Court of Claims.

IMMUNITY—*absolute privilege applied to intergovernmental communications of all executive branch officers—libel action dismissed—petition for rehearing denied.* In a libel action filed by a State official alleging that a university associate chancellor, acting in his official capacity, libeled him in a letter to State and university officials, the claim was barred by the absolute privilege applicable to intergovernmental communications of all executive branch officers, and the Claimant's petition for rehearing was denied.

OPINION

EPSTEIN, J.

This is a libel action by one State official against another. This intergovernmental libel claim is before us on the Respondents' misdesignated section 2—615 motion to dismiss which asserts, alternatively, the defenses of absolute privilege and qualified privilege of public officials for intergovernmental communications within the scope of their official duties. Without objection by, nor prejudice to, the Claimant, Respondents' motion is treated as a

section 2—619 motion. For this purpose the well pleaded facts alleged in the complaint must be taken as true.[1]

Also before us is the question of this Court's subject matter jurisdiction over the count I claim against Respondent Smith, individually, who is there sued personally and not in his official capacity. This issue was raised by the Court *sua sponte* and was supplementarily briefed.

The Allegations of the Complaint

Claimant O'Connor is the chief of the Illinois State Water Survey (Water Survey), which is situated on the University of Illinois' Urbana campus, but is actually a division of the Illinois Department of Energy and Natural Resources (DENR) and not part of the University, a fact not universally known on campus. Claimant brought this libel claim against an associate chancellor of the University individually (count I) and, under *respondeat superior*, against the University (count II). Respondent Joseph H. Smith (Smith) is the university's Associate Chancellor and Director of Affirmative Action and is the alleged tortfeasor.

The complaint alleges that Claimant was libeled by a letter that Smith wrote and published to two other officials: (1) DENR Director John S. Moore, Claimant's superior in the State government hierarchy, to whom Smith's letter was addressed, and (2) Chancellor Morton Weir, Smith's superior in the university hierarchy, to whom the letter was copied.[2]

[1] Respondents' motion raises only immunity defenses, which here arise on the face of the complaint rather than on extraneous facts injected by affidavit, but are nonetheless "affirmative matter . . . defeating the [tort] claim" within section 2—619(a)(9) of the Civil Practice Law (735 ILCS 5/2—619(a)(9)). Such defenses are appropriately raised by section 2—619 motion. (*Meyer v. McKeown* (1994), 266 Ill. App. 3d 324, 641 N.E.2d 1212.) Respondents' motion does not attack the sufficiency of the underlying libel claim nor the libelous characterization of Smith's letter, as a real section 2—615 motion might do. Accordingly, the Court will not address the merits of the libel action as alleged.

[2] In his briefs, the Claimant suggests without support that the Respondent Smith was responsible for the publication in various campus or town publications of the letter or of some of its contents. As nothing of this tenor is alleged in the complaint, such insinuations are improper and are disregarded by the Court.

The subject of Smith's letter was a series of complaints against Chief O'Connor that were purportedly made by (or on behalf of) Water Survey employees and that alleged various discriminatory acts by O'Connor. The complaints had been mistakenly submitted to Associate Chancellor Smith, although he and the University have no jurisdiction to investigate or act upon employment matters at the Water Survey. The letter's ostensive purpose was to forward the discrimination complaints to the DENR director, who has jurisdiction over O'Connor, and to urge action. Smith's letter urged "prompt action to resolve this troublesome situation."

The complaint alleges malice by Associate Chancellor Smith and, more or less, that his letter endorsed the substance of the discrimination complaints. The complaint specifically alleges the following excerpts from Smith's letter to be "false, defamatory and libelous" (par. 3) and that he published them with reckless disregard as to whether they were true or false" (par. 5):

"Suffice it to say, that there is a pattern of behavior which on its face is discriminatory against staff members of foreign background and, in this instance, are also people of color.

* * *

Harassment and intimidation are the means by which staff members have had their well-being threatened and compromised by Chief O'Connor, according to those directly affected as well as those associated with him."

O'Connor alleges that Smith's letter resulted in his placement on a lengthy administrative leave and loss of various employment benefits.

The Parties' Contentions

Respondents assert absolute immunity, as a matter of common law, based on Respondent Smith's status as a public official, for communications made by him within the scope of his official duties, relying on *Blair v. Walker* (1976), 64 Ill. 2d 1, 349 N.E.2d 385 and its progeny;

Respondents claim that the letter was a proper intergovernmental communication reasonably related to Smith's duties. Respondents alternatively argue that if absolute privilege does not apply, then qualified (conditional) privilege applies here, based on the elements set forth in *Edwards by Phillips v. University of Chicago Hospitals and Clinics* (1985), 137 Ill. App. 3d 485, 484 N.E.2d 1100, and requires dismissal of O'Connor's libel action.

The Claimant disputes the applicability of absolute immunity to Associate Chancellor Smith, contending primarily that he is too far down the chain of command to be covered by the Illinois doctrine of absolute immunity for executive officials which, Claimant urges, is limited to chief executive officers and their equivalents, relying also on *Blair v. Walker*, *supra*, and later opinions. Claimant alternatively argues that if absolute immunity applies, Smith's publications of his letter were outside his official duties and thus unprotected by the privilege. Claimant also disputes the applicability of qualified immunity, and finally argues that his allegations of malice are sufficient to support his libel claim even if qualified immunity is held applicable.

On the jurisdictional issue, both the Claimant and the Respondents rely on *Healy v. Vaupel* (1990), 133 Ill. 2d 295, 549 N.E.2d 1240, as the latest and most authoritative pronouncement of our Supreme Court on this Court's jurisdiction over claims against State employees and officers individually. Both sides contend that *Healy* supports their position on count I as to Mr. Smith individually.

I.

Jurisdiction over the Claim against the Individual Respondent

Count I seeks a money judgment against an individual Respondent (Smith), individually, and is predicated on the claim that Smith, a State (university) employee

and official, was acting *outside* of his official government duties when he committed a common law libel.[3] Count I is thus a garden variety tort claim against an individual who just happens also to be a State university official. Because sovereign immunity does not cover that kind of tortious conduct by State employees, there is no basis for jurisdiction in this Court over this count I claim. *Healy v. Vaupel* (1990), 133 Ill. 2d 295, 549 N.E.2d 1240; *Currie v. Lao* (1992), 148 Ill. 2d 151, 592 N.E.2d 977.

Healy v. Vaupel, *supra*, lends no support to Claimant. *Healy* provides no basis for jurisdiction in this Court over a claim against an individual State employee for acts outside of his or her official duties. To the contrary, *Healy* holds that a claim against an individual State employee who is *alleged to have acted outside his authority or illegally* is not cloaked with sovereign immunity and is justiciable in the circuit court but, concomitantly, not in this Court.

A second analysis in *Healy* turns on the source of the legal duty on which the tort claim against the individual State employee is predicated. The Supreme Court held that where the duty sued upon itself arises from the State employment, then the individual employee is only a nominal party and sovereign immunity applies, and the claim must be brought in the Court of Claims as a claim against the State. *Healy*, 133 Ill. 2d at 313, 549 N.E.2d 1240.

Where the individual State employee is named as a "nominal" defendant in order to obtain an indirect judgment against the State, or where irrespective of the form of pleading or style of action the "real claim is against the State of Illinois itself and when the State * * * is the party vitally interested," then the action lies within this Court's exclusive

[3] Although count I does not explicitly allege that Smith acted outside of his university authority, it is clear from the complaint (e.g., count I omits the allegation, contained in count II, that Smith acted "within the * * * scope and course of his employment") as well as from Claimant's brief that his claim against Smith individually relies on this charge.

jurisdiction. (*Healy v. Vaupel*, 133 Ill. 2d 295, 549 N.E.2d 1240, 1247, quoting *Sass v. Kramer* (1978), 72 Ill. 2d 485, 41, 381 N.E.2d 975, 977.) *Healy* approved the formulation articulated in *Robb v. Sutton* (1986), 147 Ill. App. 3d 710, 716, 498 N.E.2d 267, which held that claims against individual State employees, agents or officers lie in the exclusive jurisdiction of the Court of Claims when (and only when):

"* * * there are (1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involved matters ordinarily within that employee's normal and official functions of the State * * *."

In those circumstances, "the cause of action is only nominally against the employee" (*ibid.*) and the State is the real defendant which must be sued in this court.

Under *Healy*, there is no room to argue that this claim against Mr. Smith individually lies in this court. The count I action against Smith fails each of the three wings of the *Robb v. Sutton* test approved in *Healy v. Vaupel*. That would end the analysis, except that *Healy*, despite the parties' representations, is not the last word on this subject from our Supreme Court.

Two years after *Healy v. Vaupel, supra*, our Supreme Court decided *Currie v. Lao* (1992), 148 Ill. 2d 151, 592 N.E.2d 977, in which it revisited this jurisdictional issue and adopted *Healy*'s second analysis—which was also the second wing of the *Robb v. Sutton* test approved in *Healy*—as the primary standard for applying the sovereign immunity doctrine to tort claims against individual State employees. This analysis focuses on the source of the tort duty.

Under *Curry*, a tort claim against a State employee that is founded upon an independent tort duty—one that applies to the individual independent of his or her status as a State employee or officer—is unprotected by sovereign

immunity and the employee may thus be sued individually in the circuit court. Those sorts of independent tort claims are actionable against the individual employee (whether or not acting within the scope of his official duties); but those claims are outside the exclusive jurisdiction of this Court. The Supreme Court's discussion in *Currie v. Lao* bears repeating here:

"A State employee is not immunized by sovereign immunity for his own acts of negligence merely because he was acting within the scope of his employment. (*Gocheff*, 69 Ill. App. 3d at 183, 25 Ill. Dec. 477, 386 N.E.2d 1141.) the issue of when a State employee's on-the-job negligence is immunized has been the focus of numerous divergent, and sometimes contradictory, approaches in the case law. After careful study of these approaches, we conclude that the proper inquiry is to analyze the source of the duty the employee is charged with breaching in committing the allegedly negligent act. Where the charged act of negligence arose out of the State employee's breach of a duty that is imposed on him *solely* by virtue of his State employment, sovereign immunity will bar maintenance of the action in circuit court. (*Healy*, 133 Ill. 2d at 313, 140 Ill. Dec. 368, 549 N.E.2d 1240; *American Family Insurance Co. v. Seeber* (1991), 215 Ill. App. 3d 314, 318, 158 Ill. Dec. 829, 574 N.E.2d 1222.) Conversely, where the employee is charged with breaching a duty imposed on him *independently* of his State employment, sovereign immunity will not attach and a negligence claim may be maintained against him in circuit court. (See *Seeber*, 215 Ill. App. 3d at 318, 158 Ill. Dec. 829, 574 N.E.2d 1222; *Bartholomew v. Crockett* (1985), 141 Ill. App. 3d 456, 462, 86 Ill. Dec. 656, 475 N.E.2d 1035.) In other words, where an employee of the State, although acting within the scope of his employment, is charged with breaching a duty that arose independently of his State employment, a suit against him will not be shielded by sovereign immunity.

This distinction best preserves the spirit of the sovereign immunity doctrine. The legislative grant of sovereign immunity shields the *State* from being haled into circuit court; it is *not* a blanket grant of immunity for all State employees. The rationale behind extending the immunity to State employees in certain situations is that a suit against that employee could operate to control the actions of the *State*, thereby allowing the State's immunity to be circumvented. (See *Moline Tool Co. v. Department of Revenue* (1951), 410 Ill. 35, 36, 101 N.E.2d 71.) Limiting immunity for a State employee to situations where he breaches a duty imposed on him solely by virtue of his official position furthers this rationale, for control over the actions and policies of the State could be achieved only by controlling the employee's performance of his "official" actions. A State employee who breaches a duty he owes regardless of his State employment is no more entitled to immunity than is a private individual who breaches that same duty; the mere fact of his State employment should not endow him with heightened protection. See, also, *Postich v. Henrichs*, 267 Ill. App. 3d 236, 641 N.E.2d 975 (2d Dist. 1994)."

As applied to this case, *Curry* compels the same result reached under *Healy* (because the *Curry* test was one part of the *Healy* analysis that was applied above). In garden variety tort cases like this count I libel action, where a judgment is sought against a Respondent individually who just happens to be a State employee or State officer and who is sued on a tort duty that applies to citizens generally—here the duty not to libel another—and that does not arise peculiarly from his official status or duties, then that individual may be independently culpable and may be sued individually in the circuit court but not in this Court in that capacity.[4]

Under *Healy* and under *Curry*, this libel claim against Mr. Smith individually is or was maintainable in the circuit court and is not maintainable in this Court which lacks subject matter jurisdiction over it. Accordingly, count I, against Joseph H. Smith, individually, must be and is dismissed for want of jurisdiction. In light of this jurisdictional holding, we need not and do not address the other disputed issues relating to count I.[5]

II.

The Privilege Defenses

The threshold issue presented on count II is the applicability to Associate Chancellor Smith of either absolute or qualified immunity for his intergovernmental communication to Director Moore and to Chancellor Weir. The dispositive issue is the applicability of absolute privilege, since that common law privilege, as its name suggests, is absolute and thus provides immunity from suit as well as total immunity from liability in "defamation and kindred

[4] The Court expresses no opinion as to whether any jurisdictional vitality remains in the first *Healy v. Vaupel* standard—whether the official's alleged wrongful conduct lies within or outside his official duties—as applied either to tort claims or to other claims.

[5] This Court need not and does not express any opinion on the effect, if any, of the allegation that Smith acted outside his university duties on the privilege doctrines that were asserted as defenses to the libel claim.

torts" (*Barr v. Mateo* (1959), 360 U.S. 569, 79 S. Ct. 1335, 3 L.Ed.2d 1434). If this privilege applies to this respondent, then this case is over, as this privilege is not pierced by the malice allegation and count II concedes that Smith's letter was written and sent within the scope of his duties.[6]

In the law of executive governmental privilege, absolute privilege has been the dominant, if not exclusive, doctrine invoked by our courts. Qualified or conditional privilege has rarely been applied to government officials or employees, and it is interesting to note that respondents' alternative argument is unsupported by any applications of qualified privilege to government officials or public employees.[7]

In Illinois, the analysis commences with *Blair v. Walker* (1976), 64 Ill. 2d 1, 349 N.E.2d 385, which is the leading and only decision by our Supreme Court on this issue. In *Blair*, our Court held as a matter of common law that the Governor has an absolute privilege for his "official acts" against defamation-type torts. *Blair* did not, however, decide what lesser public officials than the Governor, if any, also enjoy this absolute privilege.

Blair relied heavily on the U.S. Supreme Court's decisions in *Barr v. Mateo, supra* (which involved an acting federal agency Director) and *Spaulding v. Vilas* (1896), 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780 (Postmaster General); *Blair* recognized and discussed the debate in the *Barr* opinions as to whether the privilege should extend to officials below cabinet rank or its equivalent. (The *Barr*

[6] In count II, the Claimant specifically alleges (as well he must in order to invoke *respondeat superior* against the university) that Mr. Smith's letter was within the scope of his university employment. Accordingly, for purposes of count II as well as for count I, the Court need not and does not decide whether or not Mr. Smith's publication of the letter to the head of another governmental agency, or to his university superior, or both, falls within his official university duties. For count II, this is assumed.

[7] Qualified privilege, also sometimes called conditional privilege, provides substantial but incomplete immunity from liability, and is not an absolute bar to defamation actions. A qualified privilege does not immunize malicious defamations, nor libel *per se*, both of which appear to be alleged here.

majority held yes.) *Blair* also relied on several Illinois appellate decisions that had recognized the privilege for various executive officials: *McLaughlin v. Tilendis* (1969), 115 Ill. App. 2d 148, 253 N.E.2d 85 (superintendent of schools); *Larson v. Doner* (1961), 32 Ill. App. 2d 471, 178 N.E.2d 399 (mayor and city commissioners); and *Haskell v. Perkins* (1909), 165 Ill. App. 144 (school board architect).

While the *Blair v. Walker* opinion's reliance on *McLaughlin, Larson* and *Haskell* may arguably have been somewhat misplaced, neither those decisions nor *Blair* itself, provide any support for this Claimant's argument that the privilege is limited to chief executive officers.[8] On the other hand, none of those decisions provide any direct support for respondents' argument that the privilege applies to all executive branch officials. The *Barr v. Mateo* decision rejected the limitation of the absolute executive privilege to cabinet rank officials (360 U.S. at 572), but it is not at all clear that this aspect of *Barr* was adopted by our Supreme Court.

However, our Supreme Court in *Blair* clearly adopted the rationale for the privilege articulated in *Barr* (349 N.E.2d at 388), which remains the guiding light for application of this policy-based common law privilege:

"The reasons for the recognition of the privilege have often been stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to government service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. 564, 571, 79 S. Ct. 1335, 1339, 3 L.Ed.2d 1434, 1441.

[8] *Haskel v. Perkins, supra*, involved a school architect as Defendant and arguably applied qualified rather than absolute privilege, as the opinion dwells on malice and libel *per se*, which are both irrelevant under absolute privilege. *Larson v. Doner*, *supra*, involved a resolution passed at a city council meeting, and plainly involved legislative rather than executive privilege. *McLaughlin v. Tilendis* followed *Donner v. Francis* (1930), 255 Ill. App. 409 (V.A. hospital officials), which applied federal common law, and also relied on *Larson, supra* and *Haskel, supra*. Thus the Illinois precedent underlying *Blair v. Walker* was less than firm.

This principal, however, provides little guidance on how far down the chain of governmental command an absolute privilege is justified.

In *Barr v. Mateo*, Mr. Justice Black's concurring opinion suggested limiting the privilege to policy-making officers, on the theory of derivative immunity from the Chief Executive. (360 U.S. at 582.) Justice Black, focusing on public statements as distinguished from purely internal governmental communications, expressed great concern for the potential abuse of executive privilege by government officials, particularly abuse aimed at critics of government. He advocated giving a qualified privilege to lower-ranking officials (360 U.S. at 584):

> "Giving officials below cabinet or equivalent rank qualified privilege for statements to the public would in no way hamper the internal operation of the executive department of government, nor would it unduly subordinate the interest of the individual in obtaining redress for he public defamation uttered against him."

Neither view of Justice Black has been adopted by any court in Illinois as nearly as we can ascertain, although it is far from clear that the issue is foreclosed.

In *Colaizzi v. Walker* (1976), 542 F.2d 969, which was decided shortly after *Blair v. Walker* was decided by the Illinois Supreme Court, the Seventh Circuit reviewed the dismissal of libel claims against the Illinois Governor (Dan Walker), the Director of [the Governor's] Office of Special Investigations (Donald Page Moore), and an employee of the O.S.I. (Lauri Staples) arising out of internal communications and a press release and a news conference. The Seventh Circuit, interpreting and applying Illinois law as reflected in *Blair*, held that intergovernmental communications between these defendants were absolutely privileged. That disposed of the claim against Staples. The dismissal of the claims against the Governor was also affirmed, on the basis that his absolute immunity

covered both the internal communications and his press statement and press conference. However, the claim against Moore for his (public) news conference statements was held to have exceeded inter-official communications, which were immune. Because those public statements may have exceeded his official duties so as to be unshielded by the privilege, the claims against Moore were reinstated but remanded for further fact-finding. See 542 F.2d at 969.

Claimant relies heavily but mistakenly on *Colaizzi* to support his argument that Illinois law restricts executive absolute immunity to the highest ranking officers of the State. *Colaizzi* did nothing of the sort. Contrary to claimant's argument, the *Colaizzi* court did indeed extend the absolute immunity to the employee Staples for her intergovernmental communications.

But *Colaizzi*, like the seminal *Barr v. Mateo* decision, points up a distinction that is often glossed over. That distinction—between intergovernmental communications and public statements—arises under the second issue in the absolute privilege cases: the issue of whether the official acted within the scope of his or her duties, and thus whether the particular statement is covered by the absolute privilege. (This issue is not presented here on the pending motion to dismiss.) However, this issue is *not* a matter of the applicability of the privilege to the *official*, as the Claimant seems to argue to us; this is solely a question of the privilege's applicability to the particular *act* of the official. As the Supreme Court observed in *Barr*:

"To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions. But that is because the higher the post, the broader the range of responsibilities and duties, and the wider the scope of discretion, it entails. It is not the title of his office but the duties with which the particular officer sought to be made to respond in

damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spaulding v. Vilas, supra* [citation omitted]—which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits."

This oft-quoted and oft-misapprehended aspect of *Barr v. Mateo* is little more than a statement that the privilege is no broader than the official's official duties, and that in the ordinary course it is likely that the higher the official the broader his or her duties and privilege, and vice-versa. Although this simple principle has rarely found application in Illinois (*Colaizzi* is one of the few examples), it is part of *Barr v. Mateo* that seemingly applies under *Blair v. Walker*, but in no way mitigates the threshold applicability of the privilege to lower ranking executive officials.

In the years since *Blair v. Walker, supra*, was decided in 1976, there have been critical voices in the Illinois judiciary addressing the wisdom of automatic application or extension of the executive immunity doctrine, and even of the *Blair* decision. See, e.g., *Williams III v. Fischer* (1991), 221 Ill. App. 3d 117, 581 N.E.2d 744, 745-746, concurring opinion of Justice Chapman:

"* * * I am concerned that the majority's opinion is another * * * which could be construed to mean that a public official can *never* be liable for statements made in his official capacity; second, I think that the broad holding of *Blair* warrants reexamination.

* * *

* * * critics of government officials cannot maliciously lie about those they oppose. Therefore, if a challenger in an election defames his opponent, the challenger could be subject to liability. Under the doctrine of absolute immunity the same is not as true of the incumbent. A person holding an office is free to malign the challenger * * * and if he can * * * maintain that his statements are necessary because of his official capacity, he can wrap himself in a cloak of absolute immunity.

* * *

I would submit that the [*Barr v. Mateo*] majority's concern about "vindictive or ill founded damages suits" may no longer be the compelling basis it was in the time of *Barr*.

Finally, the cases * * * express a familiar concern that, absent the claim of absolute immunity, public officials would be so inundated with claims they would fail to make the pronouncements required by the duties of their offices. * * * Sound empirical support for such claims is as rare as the threats are frequent."

Most of the post-*Blair* decisions in Illinois have simply assumed, without analysis, that executive absolute privilege applies across the board under *Blair v. Walker.* There are simply no decisions to be found that reject immunity on executive rank grounds. On the other hand, the reporters are replete with Illinois decisions extending—or simply applying—the immunity doctrine to executive officers of less than C.E.O. rank and less than cabinet rank, starting of course with *Colaizzi v. Walker* (1976), 542 F. 2d 969 (Governor, Director, investigator), on which the Claimant here erroneously relies.

Other post-*Blair* decisions applying absolute privilege to executive officers include: *Loniello v. Fitzgerald* (1976), 42 Ill. App. 3d 900, 356 N.E.2d 842 (Mayor); *Savarirayan v. English* (1977), 45 Ill. App. 3d 105, 359 N.E.2d 236 (federal employees, physicians, applying federal law); *Glass v. Jackson* (1978), 65 Ill. App. 3d 732, 382 N.E.2d 709 (Director, Program Director, Office Chief of State agency); *Springer v. Harwig* (1981), 94 Ill. App. 3d 281, 418 N.E.2d 870 (village manager); *Morton v. Hartigan* (1986), 145 Ill. App. 3d 417, 495 N.E.2d 1159 (Attorney General, 1st Asst. Attorney General, Chief of Welfare Litigation Div'n.); *Dolatowski v. Life Printing and Publishing Co., Inc.* (1990), 197 Ill. App. 3d 23, 554 N.E.2d 692 (police superintendent); *Williams III v. Fischer* (1991), 221 Ill. App. 3d 117, 581 N.E.2d 744 (county coroner); *Geick v. Kay* (1992), 236 Ill. App. 3d 868, 603 N.E.2d 121 (village board President); *Harris v. News-Sun* (1995), 269 Ill. App. 3d 648, 646 N.E.2d 8 (police detective).

Rightly or wrongly, this body of law has grown up despite the weakness of the underpinnings of *Blair v. Walker*

and even of *Barr v. Mateo*.[9] Members of this Court share some of the concerns expressed in the dissenting and concurring opinions in *Barr v. Mateo*, *supra*, and even some of those expressed more recently by other courts. This Court particularly questions the need to insulate lower public employees with absolute immunity, when qualified immunity might suffice to meet the policy goals of the immunity doctrines, and when statements *by* the public or individual citizens receive only qualified privilege under the constitutional immunity afforded by *New York Times v. Sullivan* and its progeny. This imbalance between the exposure to defamation liability as between public employees and their taxpaying employers is surely less today than when Mr. Justice Black pointed out the disparity in *Barr* concurrence. Still, it is hard to perceive why one level of immunity suffices for one side of the government desk but not for the other. Those considerations, however, are for the Illinois Supreme Court and not for this Court. It is for us to apply the law as it is.

Although there are arguable predicates for disputing the vitality of the body of law that has grown up around *Blair v. Walker* in Illinois, we are constrained to follow the overwhelming weight of the decision law that Illinois common law extends absolute privilege for intergovernmental communications to all executive branch officers, and thus to the Assistant Chancellor of the University of Illinois whose privilege is here in issue.

[9] Justice Black's concurring analysis in *Barr* is instructive on the history of this immunity doctrine in its executive formulation. His historical review of privilege law reflects a surprisingly weak and brief precedential basis for the executive privilege, unlike the legislative and judicial privileges. His research traced the legislative privilege in England back to 1399 and judicial immunity back to 1608 (360 U.S. at 579-580). The executive privilege was traced back to its inapposite origins in military law, the earliest reported English decision being *Sutton v. Johnstone*, 1 T.R. 493 (1786) (Court of Exchequer) (captain of a naval warship), and the earliest civil executive application being as late as 1895, in the English case of *Chatterton v. Secretary of State for India*, 2 Q.B. 189. That was just one year before the seminal American decision in *Spaulding v. Vilas* (1896), 161 U.S. 483, 16 S. Ct. 631, 40 L. Ed. 780, which involved our Postmaster General, and in which the Supreme Court relied exclusively on judicial immunity precedents.

We need not and do not address the application of the privilege to public statements, as not public dissemination is alleged in count II of Claimant's complaint. As our holding on the absolute privilege doctrine disposes of the count II claim, there is no reason for us to discuss the Respondents' alternative defense of qualified privilege.

The count II claim is barred by privilege and must be dismissed. Count II is dismissed.

SUPPLEMENTAL OPINION ON PETITION FOR REHEARING

EPSTEIN, J.

Claimant has petitioned for rehearing on his count II *respondeat superior* claim for libel against the university, which is based on a letter of one of its Assistant Chancellors. We dismissed this libel claim as barred by the absolute privilege "for inter-governmental communications [of] all executive branch officers" which Illinois provides under *Blair v. Walker* (1976), 64 Ill. 2d 1, 349 N.E.2d 385 and its progeny. (Slip. Op., 7-12.)

Claimant now says: (1) that the court over-broadly applied the privilege, which is said to be applicable only to a "narrow category of communications" made by public officials "under express authority of law," *Zurek v. Hasten*, 553 F. Supp. 745, 748 (N.D. Ill. 1982), and (2) that the Assistant Chancellor's letter was "clearly beyond the scope of his official duties and * * * is therefore not covered by absolute privilege." (petition for rehearing, 2.)

This Court pointed out that the absolute privilege doctrine is no broader than the official's official duties under *Barr v. Mateo* (1959), 360 U.S. 569, as followed in Illinois by *Blair v. Walker, supra,* and *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976) (applying Illinois law). (Slip. Op., 9-10.) Nothing new is advanced by Claimant.

Moreover, as we also pointed out (*id.*, at 9), no issue as to the scope of applicability of this executive privilege is presented here. That issue is still not presented by Claimant's petition for rehearing, and cannot be, because count II alleges that the Assistant Chancellor's acts were within the scope of his university responsibilities. Claimant cannot be heard to argue otherwise.

Claimant's argument is legally suicidal as well as procedurally improper. The *respondeat superior* claim can never be resurrected by arguing that the alleged libel was outside the scope of its author's employment by the respondent: an employer is liable by *respondeat superior* only for the torts of its employees committed *within* the scope of their employment. Illinois adheres to this elementary, bedrock rule of law, *Pyne v. Witmer* (1989), 129 Ill. 2d 351.

Thus even if Claimant were to avoid the bar of absolute privilege by his reversal of allegations, he still shoots himself in the (other) foot with this contention, because his outside-the-scope allegation defeats his vicarious liability claim against the university as a matter of law. No reason is presented for us to reconsider our judgment dismissing Claimant's count II claim against the University of Illinois.

Claimant's petition for rehearing is denied.

(No. 95-CC-2468—Claimant awarded $50,000.)

In re APPLICATION OF DARLA POWELL

Opinion filed September 27, 1996.

HATTERY, SIMPSON & WEST (S. DAVID SIMPSON, of counsel), for Claimant.

JIM RYAN, Attorney General (JULIE A. SMITH, Assistant Attorney General, of counsel), for Respondent.

NATIONAL GUARDSMAN'S COMPENSATION—*relevant inquiry in heart attack cases.* Pursuant to the Illinois National Guardsman's Compensation Act, in the many heart attack cases that come before the Court, the issue is whether the decedent's life was lost as a result of injury received in the active performance of his duties as a National Guardsman and whether the injury arose from violence or other accidental cause.

SAME—*decedent suffered fatal heart attack while participating in inactive duty training—award granted.* Where the decedent, a staff duty sergeant in the Illinois Army National Guard, died shortly after suffering a heart attack during a two-mile run that was part of his inactive duty training, the decedent was acting in the line of duty at the time of his death, and his wife was awarded compensation pursuant to the Illinois National Guardsman's Compensation Act.

OPINION

FREDERICK, J.

This claim arises out of the death of Staff Sergeant Marvin W. Powell, Jr. The Claimant, Darla Powell, the decedent's widow seeks compensation pursuant to the provisions of the Illinois National Guardsman's Compensation Act. 20 ILCS 1825/1 through 1825/5.

The decedent, Marvin W. Powell, Jr., was a Staff Sergeant of Battery A, 1st Battalion, 202nd Air Defense Artillery, Illinois Army National Guard, Galesburg, Illinois. At the time of his death, he was participating in his unit's Inactive Duty Training Assembly of April 9, 1994, as ordered. At or about the time of his death, Sgt. Powell was participating in a two-mile run that was part of the Army Physical Fitness Test (APFT). At the conclusion of the run, Sgt. Powell collapsed and was taken to a local hospital where he was pronounced dead. An autopsy revealed that Sgt. Powell died of acute cardiac failure due to stenosis of the aortic valve. The coroner's certificate of death lists acute cardiac failure as the cause of death. The Claimant, Darla Powell, the surviving spouse of the decedent, is the

designated beneficiary of Staff Sergeant Marvin W. Powell, Jr. pursuant to the Act.

In the many heart attack cases that come before the Court, the issue is whether the decedent's life was lost as a result of injury received in the active performance of his duties as a National Guardsman and whether the injury arose from violence or other accidental cause. 20 ILCS 1825/2.

The facts of this case are closely analogous to those of *In re Application of Elizabeth Gasper* (1965), 25 Ill. Ct. Cl. 186. In *Gasper, supra*, the widow of a major in the Illinois Air National Guard sought benefits as the result of her husband's death while performing duty in an "Inactive Duty Training" status. (*Id*. at 187.) The Court found that Mrs. Gasper was entitled to the compensation available under the Act because her husband was performing inactive duty training at the time of his death as ordered by his commanding officer and therefore died in the line of duty. Staff Sergeant Powell died while performing a physical task.

The decedent died within one year of the injuries he sustained from an accidental cause, i.e., acute cardiac failure due to stenosis of the aortic valve. The decedent's death was not a result of willful misconduct or intoxication of the decedent. The applicant submitted a claim within one year of the decedent's death. The proof submitted in support of this claim satisfies the requirements of the Act that the decedent was acting in the line of duty at the time of his death and the claim is therefore compensable thereunder.

Therefore, it is ordered that Claimant, Darla Powell, surviving spouse of the decedent, Marvin W. Powell, Jr., be and hereby is awarded $50,000 pursuant to the Illinois National Guardsman's Compensation Act.

(No. 95-CC-3631—Claim dismissed.)

JACK KULAS, Claimant, *v.* JOSEPH H. VOGLER, Public Administrator and Guardian of Lake County, Respondent.

Order filed May 6, 1997.

DEREK A. GILNA, for Claimant.

JIM RYAN, Attorney General (IAIN D. JOHNSTON, Assistant Attorney General, of counsel), for Respondent.

JURISDICTION—*claim alleging public administrator's breach of contract to convey real estate dismissed for lack of jurisdiction—contract executed in private capacity.* The Court of Claims had no jurisdiction to entertain a buyer's claim alleging that the Respondent, a public administrator and county guardian, breached a contract to convey real estate, since the complaint's substantive allegations showed that the Respondent executed the contract only in his judicially-appointed private capacity as executor of an estate rather than as a public official, and therefore the claim was actually against the estate and did not lie against the State of Illinois.

ORDER ON MOTION TO DISMISS

EPSTEIN, J.

This claim is before the court on the Respondent's section 2—619 motion to dismiss (735 ILCS 5/2—619), supported by an affidavit and contract documentation, which asserts that this court lacks subject matter jurisdiction over this claim. Claimant did not file a response.

This real estate contract claim is brought against Respondent Vogler as "an officer of the state" and names him in his capacity as the Public Administrator and Guardian of Lake County, in which capacity he is alleged to have acted in the transaction that is the subject of this claim. In particular, Respondent Vogler is alleged to have executed the real estate purchase/sale contract (on which this claim is based) in his capacity as a State official. The Claimant, as contract buyer, seeks damages for Respondent's alleged breach of his contract to convey real estate.

Respondent asserts that in this transaction he was acting as the judicially-appointed executor of an estate. Respondent contends that this claim is actually against the estate, and against him only in his capacity as executor and not in his capacity as public administrator (i.e., not as a State official or State employee) and that therefore this action is not against and does not lie against the State. Respondent argues that this Court lacks jurisdiction over this claim because the claim is against the estate.

Although Respondent's analysis is a slight oversimplification, we agree. This claim is not properly against the State. According to the substantive allegations of the complaint, this is a claim solely against the probate estate. As appears from the complaint as well as from Respondent's motion, Respondent Vogler undisputedly executed the real estate contract in his capacity as executor of the estate, and only in that capacity. Claimant's contract was thus with the probate estate and not with the State of Illinois, and we find nothing in the complaint to allege otherwise.

In addition, the complaint seeks relief only from the estate. Nothing in the complaint seeks payment of State funds; nothing in the complaint provides a claim against State funds.

As a claim against a probate estate, this claim is outside the jurisdiction of this Court as prescribed by section 8 of the Court of Claims Act. (735 ILCS 505/8.)

We must point out that Respondent has failed to address the fact that he simultaneously held both the State capacity and the judicially-appointed private capacity. It may be argued that to some extent he acted both as executor and as Public Administrator. (It appears, for example, that Mr. Vogler was appointed to the second capacity (executor), because of his status as Public Administrator.) Like policemen off duty but within their jurisdiction, the

Claimant never quite loses his status as a public officer. But he does not always *act* in his State capacity even though he retains it. It is clear in this contract case that the *operative* capacity in which Mr. Vogler acted in this real estate transaction was that of executor and not that of his public office. Moreover, no substantive or substantial nexus with his official capacity has been alleged.

However, our conclusion here does not suggest that there can never be a case where both public and private capacities may be operative so as to give rise to some kind of State liability. That possibility, however, is not fairly presented in this case.

This claim is dismissed for want of subject matter jurisdiction.

(No. 96-CC-0163—Claims dismissed.)

JOSEPH M. GLISSON, Claimant, *v.* SOUTHERN ILLINOIS UNIVERSITY, Respondent.

Opinion filed December 27, 1995.

Opinion filed October 18, 1996.

JOSEPH M. GLISSON, *pro se*, for Claimant.

LEE ELLEN STARKWEATHER, for Respondent.

NOTICE—*Act's notice requirement does not apply to defamation claims.* The notice requirement of section 22—1 of the Court of Claims Act directing that any person commencing an action for damages on account of any "injury to his person" shall file the notice specified therein, does not apply to defamation claims since the statutory language and legislative purpose of that section indicate that physical or bodily injury is the object of the notice requirement.

COLLATERAL ESTOPPEL AND *RES JUDICATA*—*Claimant's libel and slander respondeat superior claims against university barred by res judicata—claims dismissed.* After an appellate court affirmed the trial court's dismissal with prejudice of the Claimant's libel and slander actions against a university employee, the Court of Claims determined that the judgment, which was final

and on the merits, was *res judicata* and barred derivative libel and slander claims against the university under the theory of respondeat superior, and therefore those claims were also dismissed with prejudice.

OPINION

EPSTEIN, J.

Claimant Joseph M. Glisson filed his 4-count, 77-paragraph verified complaint *pro se*, in which he alleges libel and slander by the Respondent, Southern Illinois University (SIU), through the acts of certain of its employees. These claims for declaratory and injunctive relief and damages are before the Court on the Respondent's motion to dismiss.

Respondent's motion is based on the statutory tort notice requirement of section 22—1 of the Court of Claims Act (705 ILCS 505/22—1); Respondent asserts that Claimant did not comply with our rule 50(b) (74 Ill. Adm. Code 790.50(b)) [Complaint—Required Provisions, (b) Personal injuries] in that Claimant's complaint in this Court failed to have attached to it

"* * * copies of the notices served as required by Sec. 22—1 of the Court of Claims Act [citation omitted], showing how and when such notices were served."

It is undisputed that Claimant Glisson did not file the statutory notice with the Attorney General or with our clerk and did not attach such notice to his complaint.

Compliance with the notice requirement is jurisdictional. While timely inclusion of the notice with a complaint in this Court can satisfy both the statute and the rule (*Crosier v. State* (1988), 40 Ill. Ct. Cl. 202), it is also clear that the rule is coextensive with the statute, which it implements. Service and filing of the notice are not required if the notice statute is inapplicable, which is what Claimant contends in reply to the University's motion.

Mr. Glisson argues that the statutory notice requirement does not apply to defamation actions, like the libel and slander claims in this case, for which he relies primarily on the language of section 22—1. The specific statutory construction issue thus presented by this motion is whether or not defamation actions are claims "on account of * * * injury to [the] person" within the meaning of the section 22—1 notice statute.

Although neither of the parties has drawn our attention to precedents, this Court has held that a slander action:

"* * * is a 'personal action' but not an action for personal *injuries*. Therefore, notice [i]s not required to be filed pursuant to section 22—1 of the Court of Claims Act." *Fryman v. Board of Trustees of the University of Illinois* (1989), 42 Ill. Ct. Cl. 132, 135 (order on motion to dismiss, per Raucci, J.)

Fryman would end the debate in this case, except for two factors that prompt us to revisit this narrow but recurring issue. First, in *Fryman*, which involved a slander claim, this procedural issue was disposed of by summary order. Second, two arguments are advanced here that were not raised in *Fryman* which warrant a fresh review and opinion by this Court.

Section 22—1 of the Court of Claims Act provides, in relevant part (emphasis added):

"§22—1. [**Actions for personal injuries—Notice—Contents.**] Within 1 year from the date that such an injury was received or such a cause of action accrued, any person who is about to commence any action in the Court of Claims against * * * the Board of Trustees of Southern Illinois University * * * for damages on account of *any injury to his person* shall file in the office of the Attorney General and also in the office of the Clerk of the Court of Claims, either by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, a brief description of how the accident occurred, and the name and address of the attending physician, if any, except as otherwise provided by the Crime Victims Compensation Act." 705 ILCS 505/22—1.

Respondent urges that the statutory phrase "injury to his person," which defines the class of claims to which

this notice requirement applies, should be construed to include defamation claims on the basis of the character of defamation injuries and the legal meaning of the terms employed in the statute. Respondent does not, however, cite any settled definition or judicial construction of "injury to the person," and we have found none.

Nevertheless, Respondent cites an encyclopedia definition of the similar term "personal injury" (74 Am. Jur. 2d Torts, §2) and a statement from the same treatise that "Defamation law protects interests of personality, not of property." (50 Am. Jur. 2d, Libel and Slander, §2.) Finally, Respondent advances a statutory construction argument based on the Illinois General Assembly's treatment of the identical phrase in a separate statute (the Survival Statute, 735 ILCS 5/27—6) where the legislature specified survival of damages actions for "injury to the person [except slander and libel]." This legislative usage is said to demonstrate the legislative meaning or understanding of the term "injury to the person" to include defamation injuries.

We are unpersuaded by the definitional arguments revolving around the similar but distinct phrase "personal injury." Indeed, the fact that the phrase "personal injury" seemingly has a fairly settled legal meaning, while the less common usage "injury to the person" does not, at least suggests that a different meaning might have been intended. Neither argument, however, is compelling.

Respondent's second contention, based on the legislative usage, in another act, of the same term with the limiting parenthetical qualifier, is a cogent legislative interpretation argument. However, upon close examination, that legislative usage in the survival statute discloses little more than that its legislative draftsman or draftswoman considered that the unqualified phrase "injury to the person" *might* include defamation injuries, not that it necessarily

does. This conclusion flows from the unusual employment of a parenthetical qualifier in this statute—a hesitant clarifier—as well as from the absence of any settled common law definition for this legal term to which the legislative drafter might have been responding. In this context, the parenthetical is evidence of the *absence* of a defined meaning much more than it is evidence reflecting the existence of one.

The term "injury to the person" standing alone is remarkably ambiguous with respect to injuries to reputation; the phrase does not itself include nor exclude defamatory injuries. Whether the phrase was intended to include or exclude defamation injuries, therefore, turns on manifested legislative intent, for which one must turn to the statutory context, the legislative purpose of the Act or of the statutory amendment that added the phrase and, where available, the legislative debates and other legislative history.

The legislative purpose and language of this section 22—1 tort notice statute (705 ILCS 505/22—1) strongly indicate that the phrase "injury to the person" was intended to have its narrower meaning here, where "person" means the physical person, rather than the broader reference to personal rights. The Claimant, arguing *pro se*, nicely summarizes the point in his argument that section 22—1 requires notice for "*bodily* injury" type of damages claims. We essentially agree.

Both the ensuing language of section 22—1 of the Court of Claims Act, as well as its prescription of the kinds of information required to be disclosed, make it clear that physical or bodily injury is the subject—and the sole object—of this notice requirement. Several of the mandated informational disclosures would have little or no application to defamation torts. This statutory provision clearly focuses on physical not verbal torts. And its

purpose, to allow the State to timely investigate the occurrence that gave rise to the impending tort claim, is also focused on the physical evidence involved. For libel and slander claims, an urgent need to collect and analyze and preserve physical evidence and to interview and preserve testimony of third-party witnesses, is hardly necessary as a matter of routine.

Finally, we must emphasize the unspoken premise of statutory tort claim notice requirements, which is timing. The underlying purpose of these notice requirements is to mandate *early* notice of the central facts of an incident to be litigated *before* the complaint is filed (which ordinarily will communicate the same information and more) which can be long after the incident. The potential time gap between the incident and the filing of the complaint is determined by the applicable statute of limitation (or of repose). The notice requirement is necessary to protect the Respondent's ability to defend—especially to gather evidence before it goes stale—because the Claimant can wait till the end of the limitation period to file.

In the case of libel and slander actions in Illinois, where the normal limitation period has long been one year (735 ILCS 5/13—201), this one-year notice statute normally has no application at all and serves no purpose. Indeed, the notice requirement is ordinarily moot. In this context, it is very difficult to argue that the General Assembly intended that defamation claims were a target of the notice requirement.

For all of the foregoing reasons, we adhere to *Fryman v. Board of Trustees of the University of Illinois* (1989), 42 Ill. Ct. Cl. 132, and again hold that the notice requirement of section 22—1 of the Court of Claims Act does not apply to defamation claims. Accordingly, the Respondent's motion to dismiss based on the section 22—1

notice requirement must be, and is, denied. This cause is remanded to a commissioner for further proceedings.

Motion denied; claim remanded.

OPINION ON SECOND MOTION TO DISMISS

EPSTEIN, J.

These libel and slander claims are back before the Court on the Respondent Southern Illinois University's second motion to dismiss. We previously upheld Claimant Glisson's *pro se* four-count complaint against Respondent's procedural objection under the tort notice requirements of section 22—1 of the Court of Claims Act (705 ILCS 505/22—1), in our opinion filed December 27, 1996.

The Respondent now attacks Mr. Glisson's complaint on more substantive but still procedural grounds in its section 2—619 motion to dismiss, which contends that Mr. Glisson's *respondeat superior* claims against the University are barred by *res judicata* (by the judgment against Claimant's libel/slander claims against the alleged tortfeasor-employee) and by the one-year Illinois statute of limitations for defamation actions. 735 ILCS 5/13—201.[1]

The *Res Judicata* Arguments

Respondent contends that these defamation claims against it are barred by the August 3, 1995, judgment in *Glisson v. Wright*, No. 95-L-151, Circuit Court, First Judicial Circuit, Jackson County, Illinois (William G. Schwartz, J.), which dismissed with prejudice Claimant's libel and slander claims against Ms. Wright individually. Respondent urges that that judgment was on the merits,

[1] Respondent's motion also argues (Pt. II, pars. G-I) that the University is not liable under *respondeat superior* because the alleged tortious conduct of its employee was "not within the scope of her employment as alleged * * *." This independent contention is unsupported by evidentiary material, as is required of section 2—619 motions based on facts *dehors* or contrary to the allegations of the complaint. Accordingly, this argument is disregarded.

that it adjudicated the underlying tort claims on which this case is based, and that it bars these claims which assert *respondeat superior* liability of the University as Wright's employer. Respondent points out that the Claimant has acknowledged in this Court that his circuit court claims against Ms. Wright "aris[e] out of the same occurrences" as his claims against the University here. Compl., at 24; Additional Required Provisions, par. 8.

Claimant offers two responses. He first points out that the circuit court judgment was appealed, and urges that a ruling on *res judicata* is premature until the appellate process finally affirms or reverses the judgment for Ms. Wright. Second, Claimant says that his circuit court complaint is "not identical" to his complaint in this Court, from which he argues that "it is possible" he could lose the appeal "and still have a viable case against SIU."

Analysis: *Res Judicata*

We agree with Claimant that the *res judicata* issue is not ripe for decision while the circuit court judgment is not final. We have therefore stayed our proceedings. However, on July 26, 1996, the Appellate Court issued its Rule 23 Order affirming the dismissal with prejudice of Claimant's actions against Respondent's employee. (*Glisson v. Wright* (5th Dist. 1996), No. 5-95-0712, Rule 23 order.) No further appeal was taken.[2]

The appellate court rejected Mr. Glisson's libel and slander claims outright. That court held that the alleged statements and publications by Ms. Wright were not libelous *per se* and in their context were not libelous at all under Illinois' innocent construction rule (*Glisson v. Wright*, at 6-8), and at most constituted protected expressions of opinion (*id.*, at 8.) The appellate court did not rely on, but also did not reverse, Judge Schwartz' finding that

[2] It must be noted that neither Claimant nor Respondent bothered to inform this Court that the Appellate Court had issued its decision in *Glisson v. Wright*.

"* * * the plaintiff [Mr. Glisson] * * * has been actively involved in the public debate regarding logging in the Shawnee Forest. By placing himself in that debate, he has placed himself and his opinions in the public arena of comment." *Glisson v. Wright*, No. 95-L-151 (Cir. Ct., 1st Jud. Cir., Jackson Co., 1995), at p. 3.

In any event, the *Glisson v. Wright* judgment is now final, and is plainly a judgment on the merits by a court of competent jurisdiction. It is thus *res judicata* as to the libel and slander claims against Ms. Wright. Accordingly, insofar as Mr. Glisson's claims against the University are based on Wright's alleged tortious acts, and insofar as the University's liability rests on *respondeat superior*, it is clear that the judgment in favor of Ms. Wright bars the derivative action against her employer on the same underlying tort. (*Towns v. Yellow Cab Co.* (1978), 73 Ill. 2d 113, 382 N.E.2d 1217; *Leavitt v. Hammonds* (1993), 256 Ill. App. 3d 62, 628 N.E.2d 280.) The "Towns Rule" (see *Bachenski v. Malnati*, 11 F. 3d 1371 (7th Cir. 1993)), is a straightforward application of the bar wing of the three-winged *res judicata* doctrine.

Other Bases of University Liability

The only remaining inquiry is whether there is embedded somewhere in this tree-savaging 27-page+ complaint any other—*i.e.*, any unbarred—basis for defamation liability of the Respondent University. This inquiry is prompted but unaided by Claimant's cryptic contention that his complaint in this Court is "not identical" to his adjudicated allegations in the circuit court. Assuming that to be true—although the naked eye fails to confirm this—the pertinent but ignored question is whether there is any substantively *material* difference between the two sets of allegations. Claimant Glisson, a man of no few words, cannot somehow find 77 syllables to explain just how his 77-paragraph complaint in this Court differs from his 58-paragraph complaint in the circuit court. Nor does he dispute Respondent's contention that the *sole* basis of the University's liability asserted by the complaint here is *respondeat superior*.

We have nevertheless reviewed Mr. Glisson's complaint for allegations of: (1) any non-Wright-based libel or slander claims against the University; and (2) any direct, non-derivative liability on the part of the University. We find neither. That, finally, ends the analysis.

The Statute of Limitations Issue

Because the *respondeat superior* liability of the Respondent is barred by the circuit court judgment, and because the Claimant has asserted no other basis of liability against the Respondent, the foregoing analysis disposes of these claims and we need not address the limitations issues advanced.

Conclusion and Order

The Respondent's section 2—619(4) motion to dismiss these claims as barred by the judgment in *Glisson v. Wright* (Cir. Ct., Jackson Co., 1995, No. 95-L-151), *aff'd* (App. Ct. 5th Dist. 1996, Rule 23 order, No. 5-95-0712), is granted. These claims are dismissed with prejudice.

(No. 96-CC-2553—Claimant awarded $50,000.)

In re Application of Brian Jay Holt

Opinion filed July 3, 1996.

Fellheimer, Travers & Engelman (Garth S. Seiple, of counsel), for Claimant.

Jim Ryan, Attorney General (Julie A. Smith, Assistant Attorney General, of counsel), for Respondent.

Law Enforcement Officers and Firemen Compensation—*paramedic killed in car accident while responding to emergency call—compensation awarded.* Pursuant to the Law Enforcement Officers and Firemen Compensation Act, compensation was awarded to the husband of an emergency

medical technician who was killed when the fire rescue vehicle in which she was riding while responding to an emergency call collided with another vehicle, since the decedent met the definition of "paramedic" under the Act, she lost her life as a result of injuries received in the active performance of her duties as a paramedic, and the injuries arose from violence or other accidental cause.

OPINION

FREDERICK, J.

This claim arises out of the death of Betty Jean Holt on July 21, 1995. Mrs. Holt was a certified Emergency Medical Technician-Intermediate (EMT-A). The decedent's surviving spouse, Brian Jay Holt, the Claimant herein, seeks compensation pursuant to the provisions of the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen and State Employees Compensation Act (the Act). 820 ILCS 315/1, *et seq*.

The decedent, Betty Jean Holt, was an EMT-A which is defined as a person who has successfully completed a course of instruction in basic life support services. (210 ILCS 50/4.12.) She had also been provisionally qualified as an EMT-I which is defined as a person who has completed a course of instruction in specific advanced life support-mobile intensive care services. (210 ILCS 50/4.15.) EMT Holt was providing emergency medical services through the Duffy Ambulance Service which had an agreement with the Village of Odell to provide emergency medical services to that village and the surrounding communities.

At the time of her death, EMT Holt was responding to an emergency call to assist the victim of an apparent heart attack. EMT Holt was the right front passenger in an Odell Fire Rescue Vehicle that was involved in a two-vehicle collision. The collision occurred as a 1994 Ford

Explorer driven by Timothy L. Maubach[1] was approaching the intersection of 2200N and 2400E from an eastbound direction and the Odell 1990 Ford F-350 Fire Rescue Vehicle, driven by Carl E. Snyder, along with front seat occupants, Richard Ribordy and Betty J. Holt, was attempting a left-hand turn from 2400E onto 2200N (southbound to eastbound). It was during this general time span that the Maubach vehicle collided with the Snyder vehicle. The force of the collision caused the Snyder vehicle to rotate counterclockwise and break up into two pieces as it tumbled to its final rest. As a result of the collision, EMT Betty J. Holt suffered multiple blunt injuries of which she died that same day.

Based on a review of the decedent's supervisor's statement and the McLean County Traffic Collision Investigation Team Report, the Court finds that the decedent was killed in the line of duty as contemplated by the Act, and more specifically, lost her life as a result of injuries received in the active performance of her duties from violence or other accidental cause. (820 ILCS 315/2(e).) The death certificate filed with the case indicates that death was the result of multiple blunt force injuries.

Section 315/2(i) of the Act sets forth the definition of the term "paramedic" as follows:

"(i) paramedic means an Emergency Medical Technician-Paramedic certified by the Illinois Department of Public Health under the Emergency Medical Services (EMS) Act, *and all other emergency medical personnel certified by the Illinois Department of Public Health* who are members of an organized body or not-for-profit corporation under the jurisdiction of a city, village, incorporated town, fire protection district or county, that provides emergency medical treatment to persons of a defined geographical area." (Emphasis added.) 820 ILCS 315/2(1).

The facts of this case are as closely analogous to the case of *In re Application of Delores E. Mielke* (1982), 35

[1] Timothy Maubach was the son of the heart attack victim and was attempting to reach his mother at the time of the collision. Mr. Timothy Maubach also died as a result of the injuries he received from the collision.

Ill. Ct. Cl. 410. In *Mielke*, the decedent was a certified paramedic who died of injuries he received while responding to an emergency call. The decedent in *Mielke* was employed by an ambulance service that had a contract with a local fire department to provide paramedic services. The Court found that the contractual agreement between *Mielke*'s employer and the village met the requirements of the Pre-Hospital Emergency Medical Services Act,[2] and therefore, qualified *Mielke*'s surviving spouse to receive compensation under the Act. *Id.*, at 412.

In the instant cause of action, the decedent provided emergency medical services through an ambulance service that had an agreement with the local government entity. This agreement met the requirements of the Emergency Medical Systems Services Act (210 ILCS 50/1 *et seq.*) as attested to by the affidavit of Steve Barron, the emergency services system coordinator. Additionally, the requirements of the Act are met since the decedent meets the definition of "paramedic" as defined by the Act itself. Based on the Toxicology Report and the Collision Investigation Report, it is clear that EMT Holt's death was not the result of her willful misconduct or intoxication, but was in fact the result of a tragic set of circumstances culminating in the accidental collision of the two vehicles. Therefore, EMT Holt's surviving spouse is entitled to receive an award under the Act.

The decedent apparently had not completed a Designation of Beneficiary form. Therefore, pursuant to the Act, the surviving spouse would receive the full award. The Claimant has met all conditions precedent for an award under the Act.

For the foregoing reasons, it is the Order of the Court that Claimant, Brian J. Holt, be awarded $50,000

[2] This Act is now known as the Emergency Medical Services (EMS) Systems Act. 210 ILCS 50/1 *et seq*.

pursuant to the Law Enforcement Officers, Civil Defense Workers, Civil Air Patrol Members, Paramedics, Firemen and State Employees' Compensation Act for the death of EMT Betty Jean Holt who was killed in the line of duty.

(No. 96-CC-2801—Claim dismissed;
petition for rehearing denied.)

DOUGLAS KEITH WHITE, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Order filed August 28, 1996.

Order on Petition for Rehearing filed January 24, 1997.

DOUGLAS KEITH WHITE, *pro se*, for Claimant.

JIM RYAN, Attorney General (DONALD S. MCLAUGHLIN, Assistant Attorney General, of counsel), for Respondent.

JURISDICTION—*inmate's constitutional claim challenging prison administrative decisions dismissed for lack of jurisdiction.* The Court of Claims does not have jurisdiction or authority to review or interfere with administrative policies and decisions of the Illinois Department of Corrections, and since disciplinary procedures that a correctional facility has in place and their application to inmates are matters within the facility's administrative discretion, an inmate's constitutional challenge to such procedures was dismissed for lack of jurisdiction.

ORDER

RAUCCI, J.

This cause coming to be heard on Respondent's motion to dismiss, due notice having been given and the Court being fully advised in the premises, the Court makes the following findings:

On March 15, 1995, while Claimant was an inmate at Stateville Correctional Center, the Adjustment Committee found him guilty of possessing a homemade knife

in the toilet of his cell on March 10, 1995. According to his complaint, Claimant was given two (2) consecutive months of confinement in Stateville Correctional Center's Disciplinary Segregation Unit; three (3) consecutive months of commissary denial and audio/visual denial, and approximately six (6) months of B-grade and demotion to C-grade for 6 months.

Claimant alleges on March 15, 1996, Stateville Correctional Center employees refused to examine evidence material to his defense at the prison disciplinary hearing finding him guilty of possessing a homemade knife in the toilet of his cell. In count III, Claimant alleges Stateville employees failed to conduct an investigation of Plaintiff's material defense. In count IV, Claimant alleges Stateville employees failed to examine material witnesses and other evidence he requested them to examine at an April 10, 1995, rehearing. He alleges he was not afforded any written or other decision of the rehearing despite numerous requests. In count V Claimant alleges he was not afforded any opportunity to attend a fourth disciplinary hearing or know of its contents. Also, Claimant alleges Stateville employee, Shirley J. Muhammed, acted as a trier of fact at the fourth disciplinary hearing despite never being a member of the panel which heard the disciplinary report or heard Claimant articulate his defense to the disciplinary report.

Claimant claims the above allegations violated his right to due process of law secured by the Illinois and United States Constitution and sections 504.80(f)(1) and (2) and 504.80(g)(i) of Title 20 of the Illinois Administrative Code (1995). Title 20 requires that Illinois Department of Corrections inmates be allowed to produce relevant documents in their defense at prison disciplinary hearings and that I.D.O.C. employees consider all material presented at such hearings that is relevant to whether the inmate being tried committed the charged offense.

Claimant alleges that as a result he suffered mental and emotional pain. Claimant seeks from the Respondent the sum of $10,000.

The Court of Claims does not have jurisdiction to review the disciplinary and administrative policies and decisions of the Illinois Department of Corrections. The disciplinary procedures that Stateville Correctional facility has in place and their application to the Claimant in this case are matters within the administrative discretion of the facility. The Court of Claims does not have the authority to interfere in a matter of administrative discretion of the institution. The Court of Claims does not have jurisdiction to consider such a claim. See *Holmes v. State*, 32 C.C.R. 275, *Brady v. State*, 32 C.C.R. 240-241. See also: *Fedder v. State*, 40 C.C.R. 201, 203.

It is hereby ordered that Claimant's action be dismissed with prejudice.

ORDER

RAUCCI, J.

This cause coming on to be heard on the Claimant's petition for rehearing *en banc*, the Court being fully advised in the premises, the Court finds:

The petition for rehearing *en banc* should be denied. It is therefore ordered that the Claimant's petition for rehearing *en banc* is denied.

(No. 96-CC-4308—Claim denied.)

LENNIL JOHNSON, Claimant, *v.* THE STATE OF ILLINOIS, Respondent.

Opinion filed January 17, 1997.

LENNIL JOHNSON, *pro se*, for Claimant.

JIM RYAN, Attorney General (MARK W. MARLOTT, Assistant Attorney General, of counsel), for Respondent.

PRISONERS AND INMATES—*negligent loss of personal property from cell—requisite proof.* An inmate at a State correctional facility may recover under a negligence theory for the loss of personal property from his cell if specific evidence is presented that the inmate had no cellmate, that the lost property was outside the reach of passersby, that the cell door was locked when the inmate left his cell, that there was a lot of traffic in the gallery, and that the State was in complete control of the cell doors, but when no bailment is established, an inmate's claim is likely to be denied unless he can prove that a guard participated in, or acquiesced to, the loss of property.

SAME—*State not insurer of inmate's property.* The State is not an insurer of an inmate's property and cannot be held responsible where other inmates engage in criminal acts directed at the property, and the State in the exercise of reasonable care cannot be expected to prevent isolated acts of pilferage in the environment of a penal institution.

SAME—*action for negligent loss of property—insufficient evidence presented—claim denied.* In an inmate's claim for the negligent loss of clothing and other items of personal property from his cell, the Claimant failed to prove his case by a preponderance of the evidence where, although he was not initially given a key to his cell and was told by officials that his key was missing, the Claimant's cellmate had a key, and the Claimant offered no proof that the cell door was locked when he left the cell, that the lost property was outside the reach of passersby, that there was traffic in the prison gallery, or that the State was in complete control of the cell door.

OPINION

FREDERICK, J.

Claimant, Lennil Johnson, an inmate of the Illinois Department of Corrections, filed his complaint sounding in tort on June 6, 1996. Claimant alleged that on or about May 14, 1996, his personal property was taken from his cell at Hill Correctional Center. The case was tried before Commissioner Shadid.

The Facts

On May 7, 1996, Claimant was released from inmate segregation and placed in housing unit 4, cell number R4A27. He had never been in this cell before. He was told by the guards that they did not have a key for R4A27. An Incident Report was filed. Mr. Johnson requested that the locks be changed on the cell because it was his belief that the key may have been stolen. He was issued a replacement key three or four days after May 7, 1996. On May 14, 1996, he returned from breakfast with his cellmate to find that their cell had been ransacked and missing were four pair of Levi jeans, three Levi jean shirts, and one pair of Bass suede shoes, two burgundy bath towels, one sweat shirt, 15 packs of Pall Mall cigarettes, and various commissary food items. The purchase price of these items totaled $352.80.

Claimant filed grievances for his loss which were denied. It is the position of the Department of Corrections that if a key was lost, then a reissue of a new key is made. If the key is stolen, then the locks would be retooled. The State's argument is that since Mr. Johnson cannot establish that the key was stolen, then the reissue of a key was proper under the circumstances. Claimant testified he subsequently reassigned himself to a different cell.

Also testifying at trial was Marion Yeazel who was Chief of Security at Hill Correctional Center. He testified as to the procedures that an inmate would follow if he did not have a key. He also testified that the prison policy was that if a key is lost, then a reissue of a new key is proper. If the key is stolen, then the locks on the cell would be changed. Claimant followed all procedures in documenting that he had no key. In fact, the authorities at the facility knew that he had no key when they assigned him to his cell. They informed him that they did not have a key

for him and did not know what happened to it. His roommate had a key to the cell.

Claimant itemizes his loss as follows:

4 pairs of Levi Jeans	4 pair @$22	= $	88.00
3 Levi jean shirts, XL	3 @$34	=	102.00
1 pair of Bass suede shoes	1 pair @$85	=	85.00
2 burgundy bath towels	2 @$7.50	=	15.00
1 sweatshirt	1 @$11.55	=	11.55
15 packs of Pall Mall cigarettes	15 @$1.75	=	26.25
Various commissary food items		=	25.00

Claimant acknowledges that these values are the total purchase price of all of the items. He does admit that he has no idea what their depreciated value would be.

The Law

The Claimant presents, as his basis for recovery, a negligence theory. An inmate of a State correctional facility may recover under a negligence theory for the loss of personal property from his cell if specific evidence is presented that the inmate had no cellmate, that the lost property was outside the reach of passersby, that the cell door was locked when the inmate left his cell, that there was a lot of traffic in the gallery, and that the State was in complete control of the cell doors. *Walker v. State* (1986), 38 Ill. Ct. Cl. 286; *Lacien v. State* (1994), 47 Ill. Ct. Cl. 221; *Montgomery v. State* (1991), 43 Ill. Ct. Cl. 244.

When no bailment is established, in most cases where personal property is taken from the cell of an inmate, the Court has denied the inmate's claim for damages. (*Owens v. State* (1985), 3 Ill. Ct. Cl. 150; *Edwards v. State* (1986), 38 Ill. Ct. Cl. 206.) To prevail, the inmate must prove that a guard participated in or acquiesced to the loss of property. (*Bargas v. State* (1976), 32 Ill. Ct. Cl.

99.) There is no general duty on the part of the State to safeguard an inmate's personal property from theft by other inmates when the property is in the inmate's cell. The State is not an insurer of an inmate's property and cannot be held responsible where other inmates engage in criminal acts directed at the property. The State in the exercise of reasonable care cannot be expected to prevent isolated acts of pilferage in the environment of a penal institution. *Moore v. State* (1989), 42 Ill. Ct. Cl. 226.

In the present case, Claimant had a cellmate, he presented no evidence that the lost property was outside the reach of passersby, he presented no evidence that the cell door was locked when he left the cell, he presented no evidence that there was traffic in the gallery, and he presented no evidence that the State was in complete control of the cell door. (*Crossland v. State* (1988), 41 Ill. Ct. Cl. 180.) The Claimant has the burden of proving his case by a preponderance of the evidence. He has failed to do so. While the Court sympathizes with his loss, under the law we cannot grant this claim.

For the foregoing reasons, it is the order of the Court that Claimant's claim be and hereby is denied.

Where person is victim of violent crime as defined in the Act; has suffered pecuniary loss; notified and cooperated fully with law enforcement officials immediately after the crime; the injury was not substantially attributable to the victim's wrongful act or substantial provocation; and the claim was filed in the Court of Claims within one year of the date of injury; compensation is payable under the Act.

OPINIONS PUBLISHED IN FULL
FY 1997

(No. 85-CV-0829—Claimant awarded $14,800.)

In re APPLICATION OF DONNA LUFAY GILLIARD BARRETT

Opinion filed March 13, 1996.
Order filed August 29, 1996.

DONNA LUFAY GILLIARD BARRETT, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*Claimant's burden of proof—Act is secondary source of compensation.* The Claimant has the burden of proving by a preponderance of the evidence that she has met all conditions precedent to substantiate an award under the Crime Victims Compensation Act and, since the Act is a secondary source of compensation, when aid is forthcoming from another source, the taxpayers have no statutory obligation to a crime victim.

SAME—*determination of claim for loss of support.* A dependent of a crime victim may be compensated for loss of support based on the victim's average net monthly earnings for the six months preceding the date of injury or $750 per month, whichever is less, and for purposes of applying the Crime Victims Compensation Act, the Court of Claims has defined "earnings" as something earned as compensation for labor or the use of capital, but social security benefits and employee disability payments do not constitute earnings under the Act.

SAME—*stipulation entered—wife of deceased crime victim awarded compensation for loss of support.* Pursuant to the parties' stipulation, the Claimant wife of a deceased crime victim was awarded $14,800 for loss of support.

OPINION

FREDERICK, J.

The Claimant, Donna Lufay Gilliard, filed her application for benefits pursuant to the Crime Victims Compensation Act, hereinafter referred to as the "Act," on March 4, 1985. This claim arises out of an incident that occurred on December 24, 1984. Donna Lufay Gilliard is the wife of the deceased victim.

On November 21, 1985, the Court rendered an opinion based on the investigatory report which denied the claim. The basis for the denial of the claim was that the Claimant had not sustained a pecuniary loss as defined by the Act. The Claimant made a timely request for a hearing on November 29, 1985. A hearing was held in this matter on July 9, 1991.

The Claimant seeks compensation for loss of support. The Commissioner reports, and the transcript of the trial supports the finding, that Claimant is not seeking compensation for funeral expenses.

There is no question that Timothy Dion Gilliard was the victim of a violent crime. There is also no question that the Claimant and deceased victim were married at the time of death. The evidence indicates that the deceased victim was supporting the Claimant. The sole issue before the Court is whether or not the deceased victim had any earnings in the six-month period prior to December 24, 1984, the date of the crime. The investigatory report indicates that the deceased victim had no earnings for the entire period of 1984. However, he did

receive $230 per week disability from his employer, Ford Motor Company. The evidence at trial indicates that Claimant had earnings of $208.01 in the six-month period before his death. The Respondent's position is that the disability payments are in the nature of accident insurance through the employer and should be deducted from earnings in determining compensable loss under the Act. The Claimant's position is that the $230 per week disability payments from Ford Motor Company were payments that helped support her family.

The Claimant has the burden of proof to prove by a preponderance of the evidence that she has met all conditions precedent to substantiate an award under the Act. (*In re Application of Lope* (1987), 39 Ill. Ct. Cl. 315; *In re Application of Bavido* (1992), 44 Ill. Ct. Cl. 449.) Compensation under the Act is a secondary source of compensation. The purpose of the Act is to aid innocent victims of crime in stated ways where aid is forthcoming from no other source. When aid is forthcoming from another source, the taxpayers have no statutory obligation to the victim. *In re Application of Lavorini* (1989), 42 Ill. Ct. Cl. 390.

This is a claim for loss of support. A dependent of a victim may be compensated for loss of support pursuant to section 10.1(b) of the Crime Victims Compensation Act. (740 ILCS 45/10.1.) The maximum award in this case could be $15,000. As used in the Act, dependent means a relative of a deceased victim who was wholly or partially dependent upon the victim's income at the time of his death. (740 ILCS 45/2.) The Act also provides in section 2(b) that loss of support shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of injury or $750 per month, whichever is less.

The Court has adopted the ordinary and common definition of "earnings" for purposes of applying the

Crime Victims Compensation Act, which is something earned as compensation for labor or the use of capital. (*In re Application of Atwell* (1991), 43 Ill. Ct. Cl. 453.) This Court has held that, in determining loss of support for purposes of an award under the Act, that Social Security benefits received by the victim did not constitute earnings upon which to base loss of support since "earnings" have uniformly been defined to be compensation for labor or the use of capital. *In re Application of Tigner* (1984), 37 Ill. Ct. Cl. 437.

We find, therefore, that the disability payments received by the deceased victim during the six-month period prior to his death were not earnings as defined in the Act. The $230 per week disability payments may not be included to establish a condition precedent to an award under the Act. However, the inquiry does not end there. There is uncontradicted evidence in the record that Timothy Dion Gilliard earned a total of $208.01 in the six-month period prior to his death. This computes to an average net monthly earning for the six months immediately preceding the date of injury of $34.67 per month. The deceased victim was born on November 7, 1955. The incident occurred on December 24, 1984.

Based on the foregoing, we find that Claimant has met all conditions precedent for an award under the Act based on the pecuniary loss as stated herein. It is appropriate that the Attorney General compute the loss based on the life expectancy of the decedent and use the figure of $34.67 per month for the earnings for the six-month period immediately preceding the date of injury. All other required statutory deductions must also be determined.

Therefore, it is ordered that the Attorney General shall compute the loss based on the findings of his opinion and file a supplemental investigatory report and proposed

order with the Court within 45 days of the date of this opinion.

ORDER

FREDERICK, J.

The parties to this proceeding have entered into a stipulation whereby the Attorney General's office has recommended that the sum of $14,800 be paid to the Claimant, Donna Lufay Gilliard for loss of support suffered as a result of the incident.

Wherefore, it is hereby ordered that the sum of $14,800 be made payable to the Claimant for loss of support for herself arising out of an incident in which Timothy D. Gilliard was a victim of a violent crime. In the event of the death or marriage of the Claimant or the Claimant's children, it is the duty of the personal representative of the Claimant to inform this Court in writing of such death or marriage for the purpose of the possible modification of the award.

It is further ordered that this case be closed.

(No. 91-CV-1429—Claim dismissed.)

In re APPLICATION OF MARTHA RICARDO

Opinion filed October 18, 1991.

Order filed December 26, 1996.

MARTHA RICARDO, *pro se*, for Claimant.

JIM RYAN, Attorney General, for Respondent.

CRIME VICTIMS COMPENSATION ACT—*time period within which application for benefits must be filed.* Pursuant to section 6.1(a) of the Crime Victims Compensation Act, an application for benefits must be filed within one

year of the occurrence of the crime upon which the claim is based, but the Court of Claims can extend the deadline an additional year.

SAME—*funeral expenses—death of aggravated battery victim 13 years after incident—claim dismissed.* In considering a claim for funeral expenses brought by the niece of an aggravated battery victim who died of related injuries 13 years after the incident, the Court of Claims initially determined that, while the niece could not receive compensation based on the crime of aggravated battery due to the length of time between the battery and the request for benefits, she may have been eligible for benefits based on the theory that a murder was committed, but after the Court referred the claim back to the Attorney General for further investigation, the niece's failure to attend a hearing resulted in the claim's dismissal for want of prosecution.

OPINION

SOMMER, C.J.

The applicant Martha Ricardo brought this claim on January 8, 1991 seeking compensation for funeral expenses under the Crime Victims Compensation Act, hereinafter referred to as the Act. Ill. Rev. Stat., ch. 70, pars. 71, *et seq*. incurred as a result of the death of her uncle, Rolando Batista. The record before us shows that Mr. Batista was a victim of an aggravated battery on April 4, 1977, and that he died on May 13, 1990. The Attorney General's investigatory report concludes that the victim died of causes directly related to the 1977 incident and states that the Cook County Medical Examiner's Office ruled the death was a homicide. The report states that all conditions of eligibility of the Act have been met and recommends an award in the statutory maximum amount of $3,000.

The length of time between the date of the incident and the date of the death raises an issue of eligibility. Pursuant to section 6.1(a) of the Act, an application for benefits must be filed within one year of the occurrence of the crime upon which the claim is based. The Court can extend that deadline an additional year. In this case, the application was filed approximately 13 years after the aggravated battery occurred. The fact that the death occurred

much later is not relevant to the date of the battery. The applicant is not eligible for compensation on the premise that an aggravated battery was committed due to the expiration of time.

However, under certain circumstances, it may be possible to establish eligibility based on the theory that a murder was committed. The final element of the murder did not occur until Mr. Batista expired. The length of time between the attack and his death, as it relates to the crime of murder is not relevant. (*People v. Carter* (1988), 168 Ill. App. 3d 237, 118 Ill. Dec. 983.) The record before us is insufficient for us to conclude that a murder was committed.

It is hereby ordered that this claim is referred back to the Attorney General for further investigation and report. In addition to addressing the issue described hereinabove, the report should include more facts on the issue of causation.

ORDER

SOMMER, C.J.

This cause is before the Court on Claimant's application for benefits. This claim was scheduled for hearing before a commissioner of this Court on September 27, 1996. A copy of a notice of hearing was mailed to Claimant and was not returned as undeliverable. Claimant failed to attend the hearing.

It is hereby ordered that Claimant's application for benefits is dismissed for want of prosecution.

(No. 91-CV-2378—Claimant awarded $632.20.)

In re APPLICATION OF JACOB TENEBAUM

Opinion filed October 30, 1996.

BOBBY LITTLE, for Claimant.

JIM RYAN, Attorney General (DONALD C. MCLAUGHLIN, JR., Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*timely notification requirement.* A Claimant under the Crime Victims Compensation Act must notify appropriate law enforcement officials within 72 hours of the perpetration of the crime or, if notification is made more than 72 hours after perpetration of the crime, it must be established that such notice was timely under the circumstances, but section 6.1(b) of the Act does not require that the Claimant himself must make the notification.

SAME—*elderly crime victim assaulted by tenant—notification was timely despite six-day delay in filing police report—award granted.* Although a 73-year-old crime victim who was assaulted by a tenant on two occasions did not file a police report until six days after the crime occurred, the Court found that his notification was timely under the circumstances based on the victim's age, his fear of his assailant, and because another tenant did notify police and the Department of Aging within 72 hours after the crime's occurrence.

OPINION

RAUCCI, J.

This claim is before the Court for hearing on an application for compensation filed by the Claimant, Jacob Tenebaum, under the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. (740 ILCS 45/1, *et seq.)* The Claimant filed an application alleging he was entitled to compensation because he was assaulted by a tenant on October 6, 1990.

An order was entered by this Court denying the claim based on the Claimant's failure to notify appropriate law enforcement officials within 72 hours of the perpetration of the crime or, in the event notification was

made more than 72 hours after the perpetration of the crime, establishing that such notice was timely under the circumstances pursuant to section 6.1(b) of the Act. The Claimant made a timely request for a hearing pursuant to section 13.1 of the Act. A hearing was held before Commissioner Steven Clark on April 30, 1996. Bobby Little, another tenant of the Claimant, appeared on behalf of the Claimant due to the Claimant being hospitalized after suffering a stroke unrelated to the injury at issue in this case. The evidence consisted of testimony from Bobby Little and hospital bills submitted documenting expenses incurred for medical treatment.

At the time of the assault, the Claimant was nearly 73 years old and was being cared for by the nurses from the Visiting Nurse Association. According to a Belleville Police report dated October 12, 1990, police visited the Claimant in the hospital and reported that the Claimant was terrified of his assailant and was fearful of reprisal if he were to report the incident. The suspect was a tenant at the Claimant's home and had access to the Claimant. Bobby Little testified that the day after the beating, he called police, who stated that they could not take any action until the Claimant signed a complaint. Bobby Little testified that he reported the assault to the Illinois Department of Aging. Meanwhile, the Claimant was beaten by his assailant again. A police investigation began after two representatives of the Visiting Nurse Association of the Department of Aging appeared at the police station to seek an investigation. The assailant was apprehended and charged.

According to bills from Memorial Hospital in Belleville, Illinois, the Claimant incurred a total of $5,133.85 as a result of the beatings the Claimant suffered at the hands of his assailant. Medicare paid $4,501.65 of these bills, and Claimant paid $632.20.

The Court has previously held that delays in reporting crimes to the police will bar compensation under the Act. (*In re Application of Smith* (1981), 35 Ill. Ct. Cl. 536; *In re Application of Goodwin* (1976), 31 Ill. Ct. Cl. 716.) In *Smith*, a nine-day delay in reporting a sexual assault caused a claim for compensation to be denied after the Claimant failed to establish that such notification was timely under the circumstances. (*Smith*, 35 Ill. Ct. Cl. at 538.) In *Goodwin*, the Court stressed that one of the objectives of the Act is to encourage prompt notification of crimes to law enforcement officials and full cooperation with law enforcement officials. (*Goodwin*, 31 Ill. Ct. Cl. at 717.) The Court also stressed that the Claimant's delay in reporting the crime may have prevented apprehension of the suspect. *Id*.

Considering the Claimant's age and his well-grounded fear of his assailant, who did in fact beat the Claimant a second time, the Claimant's reluctance to report the beatings is understandable. Bobby Little attempted to report the crime the day after it occurred, but the police did not contact the Claimant until representatives of the Department of Aging personally approached the police and accompanied an officer to the Claimant's hospital room six days after the crime occurred. Furthermore, any delay in reporting this crime, the efforts by police to apprehend and charge the assailant were unimpaired.

Therefore, because it appears that the Claimant, through police reports and the statements of his representative, Bobby Little, has established by a preponderance of the evidence that the appropriate law enforcement officials were notified within 72 hours of the crime that the crime occurred. Bobby Little testified that he notified the police and the Department of Aging the day after the crime. Section 6.1(b) of the Act does not state that the

Claimant himself must make the notification. The Court submits that the six-day delay in an official police report being filed in this case was timely under the circumstances due to the Claimant's age and fear of the assailant.

It is therefore ordered, adjudged and decreed that the Claimant be compensated in the amount of $632.20 for the medical expenses he paid as full and complete satisfaction of this claim.

(No. 93-CV-0692—Claimant awarded $8,036.06.)

In re APPLICATION OF MARTHA MONTOUR

Opinion filed February 28, 1995.
Opinion filed March 5, 1997.

MARTHA MONTOUR, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*determination of loss of earnings.* Section 2(h) of the Crime Victims Compensation Act states that loss of earnings shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of the injury or on $1,000 per month, whichever is less.

SAME—*Act provides for direct payment to service providers.* Pursuant to section 18(c) of the Crime Victims Compensation Act, the Court may order that all or a portion of an award be paid solely and directly to the provider of services.

SAME—*victim of aggravated battery—award entered for loss of earnings and medical expenses—direct payment to physician also ordered.* A victim of an aggravated battery was awarded compensation for her loss of earnings and for medical and hospital expenses incurred as a result of an arm injury sustained in the incident, and the Court further ordered that a portion of the award be paid directly to a physician who had not yet received compensation for services rendered to the victim.

SAME—*pain and suffering noncompensable under Act—claim for additional compensation denied.* The Crime Victims Compensation Act provides for violent crime victims to be compensated for pecuniary loss, loss of support,

and other expenses incurred and not reimbursed from sources other than the victim or Claimant, and since pain and suffering are specifically excluded under the Act's definition of pecuniary loss, the Claimant was denied additional compensation for pain and suffering allegedly experienced as a result of an aggravated battery.

OPINION

PER CURIAM.

This claim arises out of an incident that occurred on January 8, 1991. The Claimant, Martha Montour, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. Ill. Rev. Stat. 1989, ch. 70, par. 71, *et seq.*

This Court has carefully considered the application for benefits submitted on September 14, 1992, on the form prescribed by the Attorney General and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on January 8, 1991, Martha Montour, age 63, was a victim of a violent crime as defined in section 2(c) of the Act, to wit: aggravated battery. Ill. Rev. Stat., 1989, ch. 38, par. 12—4.

2. That the crime occurred in Chicago, Illinois and all of the eligibility requirements of section 6.1 of the Act have been met.

3. That the Claimant seeks compensation for medical/hospital expenses and for loss of earnings.

4. That after considering insurance and other sources of recovery, the Claimant's net compensable loss for medical/hospital expenses is $3,683.90. To date, the Claimant has paid $3,342.90 towards this amount.

5. That section 2(h) of the Act states that loss of earnings shall be determined on the basis of the victim's average net monthly earnings for the six months immediately preceding the date of the injury or on $1,000 per month, whichever is less.

6. That the Claimant's average net monthly earnings for the six months prior to the incident were $875. Claimant was disabled and unable to work for a period of five months and eight working days. Based upon $875 per month, the maximum compensation for loss of earnings is $4,693.16.

7. That the Claimant has received no reimbursements that can be counted as an applicable deduction under section 10.1(e) of the Act.

8. That the Claimant's net compensable loss is based on the following:

	Compensable Amount
James Schiappa, M.D.	$ 341.00
Paid medical expenses/compensable loss of earnings	8,036.06
Total	$8,377.06

9. That the Claimant has complied with all pertinent provisions of the Act and qualifies for compensation thereunder.

10. That pursuant to section 18(c) of the Act, the Court may order that all or a portion of an award be paid solely and directly to the provider of services. In the instant case, the Court finds this section applicable and orders that direct payment be made.

It is hereby ordered that the sum of $8,036.06 (eight thousand thirty-six dollars and six cents) be and is hereby

awarded to Martha Montour, an innocent victim of a violent crime.

It is further ordered that the sum of $341 (three-hundred forty-one dollars) be and is hereby awarded to James Schiappa, M.D. for the medical expenses of Martha Montour.

OPINION

SOMMER, C.J.

The Claimant, Martha Montour, was the victim of the crime of aggravated battery on January 8, 1991, from which she suffered a broken elbow that subsequently required surgery. The Claimant filed a claim for compensation under the Crime Victims Compensation Act, hereinafter referred to as the Act (740 ILCS 45/1-45/20), on September 14, 1992. This Court found that the Claimant satisfied all of the eligibility requirements under the Act and ordered the payment of an award on February 28, 1995. The Claimant received compensation in the amount of eight thousand thirty-six dollars and six cents ($8,036.06) for medical expenses and loss of earnings under section 10.1(a) of the Act and three-hundred forty-one dollars ($341) was paid directly to the provider of medical services under section 18(c) of the Act. The Claimant asked for a review of the decision and amount awarded. A hearing was held before Commissioner Michael E. Fryzel on October 12, 1995.

At the hearing, the Claimant presented no documentation relating to additional medical expenses incurred but requested additional compensation for her mental anguish. The Commissioner allowed 30 days from the date of the hearing for the Claimant to submit additional documentation of bills relating to the crime for which the

Claimant was not reimbursed. To date, the Claimant has not filed any additional documentation with the Court.

The Act provides for the victims of violent crimes to be compensated for pecuniary loss, loss of support and other expenses incurred and not reimbursed from sources other than the victim or Claimant. (740 ILCS 45/10.1.) The Claimant was provided with compensation for medical expenses incurred and now seeks compensation for pain, suffering or mental anguish. Under section 2(h) of the Act, the definition of "pecuniary loss" specifically excludes pain and suffering. Therefore, pain and suffering are not claims for which a victim may be compensated under section 10.1 of the Act.

It is therefore ordered that this Court's Opinion of February 28, 1995, is affirmed and the request for additional compensation by the Claimant, Martha Montour, is denied.

(No. 93-CV-2364—Claim denied.)

In re APPLICATION OF CHARLES R. HENRY

Order filed July 5, 1996.

JOSEPH A. LONGO, for Claimant.

JIM RYAN, Attorney General (DONALD C. MCLAUGHLIN, JR., Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Under section 10.1(d) of the Crime Victims Compensation Act, an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to her injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have contributed directly or indirectly to her injury or death.

SAME—*decedent knew of driver's intoxicated condition when she entered vehicle—claim denied.* A husband's request for compensation based on his wife's death in an automobile accident involving a drunk driver was denied, since the wife, who was a passenger in the offender's vehicle, was aware of his intoxicated condition when she entered his car, and therefore her conduct contributed to her death to such an extent as to warrant the denial of compensation to her husband.

ORDER

RAUCCI, J.

This claim arises out of an incident that occurred on January 23, 1992. The Claimant, Charles R. Henry, husband of the deceased victim, Linda M. Henry, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq*.

This Court has carefully considered the application for benefits submitted on March 12, 1993, on the form prescribed by the Attorney General and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on January 23, 1992, the victim was fatally injured as a result of a traffic accident. The incident occurred at the intersection of Foster and California, Chicago, Illinois. Police investigation revealed that the victim was a passenger in a motor vehicle driven by the offender. Prior to the incident, the victim and the offender had been drinking together at a bar. After drinking together for several hours, the offender offered to give the victim a ride in his car. The victim knew the offender was intoxicated at the time of the incident and knowingly entered the offender's vehicle. The offender was apprehended, charged and convicted of driving under the influence of intoxicating liquor.

2. That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

3. That it appears from the investigatory report and the police report that the victim was aware of the driver's intoxicated condition and knowingly entered the motor vehicle with him.

4. That the victim's conduct contributed to her death to such an extent as to warrant that the Claimant be denied entitlement to compensation.

5. That this claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be and is hereby denied.

(No. 95-CV-0137—Claim dismissed.)

In re APPLICATION OF CARMEN MELENDEZ

Order filed December 6, 1994.

Order filed July 9, 1996.

CARMEN MELENDEZ, *pro se*, for Claimant.

ROLAND W. BURRIS and JIM RYAN, Attorneys General (PAUL H. CHO, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct*. Under section 10.1(d) of

the Crime Victims Compensation Act, an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to his injury or death.

SAME—*rival gang confrontation—victim's conduct contributed to his death—claim for funeral expenses dismissed.* Where a murder victim and his assailant were members of opposing street gangs who had met with others to discuss a previous gang confrontation at which time an argument ensued resulting in the victim being shot and killed, the victim's participation in gang activities contributed to his death to such an extent as to warrant denial of his mother's claim for funeral expenses, and the claim was dismissed.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on November 2, 1992. Carmen Melendez, mother of the deceased victim, Juan A. Melendez, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1 *et seq*.

This Court has carefully considered the application for benefits submitted on July 19, 1994, on the form prescribed by the Attorney General and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on November 2, 1992, the victim was shot by an offender who was known to him. The incident occurred at 3049 West Belden, Chicago, Illinois. Police investigation revealed that the victim and his companion, both known members of a street gang, went to this area to confront members of a rival street gang over a previous fight between their gangs. A verbal altercation ensued between the members of the opposing gangs. During this

dispute, the offender, a member of the rival street gang, approached the group, produced a handgun and shot the victim and his companion. The offender was apprehended, prosecuted and convicted of first degree murder.

2. That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

3. That it appears from the investigatory report and the police report that the victim and the offender were members of opposing street gangs. This incident occurred as a result of their gang affiliation, gang rivalry and face to face provocation.

4. That the victim's conduct contributed to his death to such an extent as to warrant that the Claimant be denied entitlement to compensation.

5. That this claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be and is hereby denied.

OPINION

SOMMER, C.J.

By an order dated December 6, 1994, this Court denied the claim of Ms. Carmen Melendez for funeral benefits under the Crime Victims Compensation Act for the death of her son, Juan. Ms. Melendez requested a hearing, and a hearing was held by Commissioner Griffin

on December 18, 1995. Additionally, the Claimant appeared before Commissioner Kane on March 11, 1996, subsequent to Commissioner Griffin's retirement. At that time, Ms. Melendez was allowed to supplement her testimony with any documents she felt were relevant to the issue.

By our previous order, this Court denied an award to the Claimant because the victim's actions contributed to his death: specifically, his involvement in a street gang. While Ms. Melendez maintains that the shooting of her son was a random isolated incident which was not the by-product of rival gangs, she admits that her son was, in fact, a member of a street gang; and the witnesses interviewed by the police confirmed this fact.

Ms. Melendez lost her son in the cycle of violence which is self-perpetuating in the city of Chicago. Both her son and the other young man who was shot, had gone to the location of the shooting to discuss a previous gang fight with members of an opposing gang. It was during this discussion which became heated that Juan Melendez was shot to death by a member of the other gang. The victim was a member of a street gang, and it was his participation in gang activities which led to his death. Thus, the victim's conduct contributed to his death to such an extent as to warrant denial of this claim.

It is therefore ordered that the order of this Court dated December 6, 1994, is affirmed and this claim is dismissed.

(No. 95-CV-0298—Claim dismissed.)

In re APPLICATION OF MARGARET SCHLOTMANN

Order filed March 2, 1995.

Opinion filed November 6, 1996.

MARGARET SCHLOTMANN, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO and DONALD C. MCLAUGHLIN, JR., Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Under section 10.1(d) of the Crime Victims Compensation Act, an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to her injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to her injury or death.

SAME—*victim murdered when companion tried to purchase narcotics—contributory conduct precluded recovery—claim dismissed.* Where a mother filed a claim for the funeral and burial expenses of her daughter who was robbed and fatally shot when she and a companion attempted to purchase narcotics from their assailant, the claim was dismissed based on the daughter's contributory conduct since, despite the mother's contention that it was the companion rather than her daughter who was purchasing narcotics, she failed to present evidence to support her claim that the daughter was assisting police at the time of her death or that she did not knowingly accompany her companion to participate in the drug transaction.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on January 22, 1994. Margaret Schlotmann, mother of the deceased victim, Linda Schlotmann, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq.*

This Court has carefully considered the application for benefits submitted on August 1, 1994, on the form prescribed by the Attorney General, and an investigatory report of the Attorney General which substantiates matters set

forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on January 22, 1994, the victim was shot by an unknown offender. The incident occurred on Laura Lee Street, Cahokia, Illinois. Police investigation revealed that the victim and a companion went to this area to purchase illegal narcotics. While driving along the street, the victim and her companion allowed the offender to enter their vehicle in order to complete the drug transaction. The offender then produced a handgun and announced a robbery. The offender then fatally shot the victim and fled the scene. The offender has not been apprehended.

2. That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

3. That it appears from the investigatory report and the police report that at the time of the incident, the victim and a companion were attempting to purchase illegal narcotics from the offender. During a subsequent robbery attempt, the offender shot the victim.

4. That the victim's conduct contributed to her death to such an extent as to warrant that the Claimant be denied entitlement to compensation.

5. That this claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be and is hereby denied.

OPINION

FREDERICK, J.

This claim is before the Court on an application for compensation filed by the Claimant, Margaret Schlotmann, under the provisions of the Crime Victims Compensation Act, hereinafter referred to as the Act. (740 ILCS 45/1, *et seq*.) The Claimant filed an application alleging she was entitled to compensation for funeral and burial expenses resulting from the homicidal death of her daughter, Linda Schlotmann, on January 22, 1994.

An order was entered by this Court on March 2, 1995, denying the claim due to the victim's conduct contributing to her death to such an extent as to warrant the Claimant be denied entitlement to compensation pursuant to section 10.1(d) of the Act. The Court found the victim contributed to her death by going to the area in which she was killed for the purpose of purchasing narcotics. The victim was shot to death when the narcotics seller robbed the victim and her companion. The Claimant made a timely request for a hearing pursuant to section 13.1 of the Act. A hearing was held before the Commissioner on April 30, 1996. The evidence consists of the testimony of the Claimant.

According to the Claimant's testimony, her daughter, the victim, was not purchasing narcotics herself but her companion was. The Claimant stated that the victim was attempting to get treatment for substance abuse and was assisting the United States Drug Enforcement Administration by turning in crack houses. However, there was no evidence that at the time of her death, the victim was assisting authorities. The victim's assailant was charged with first degree murder and armed robbery and was sentenced to 35 years in prison.

Section 10.1 of the Act provides that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to her injury or death, or to the extent to which any prior conduct of the victim may have directly or indirectly contributed to the injury or death of the victim. This Court has denied awards where the death of a victim was immediately preceded by a drug transaction involving the victim. (*In re Application of Martinez* (1981), 35 Ill. Ct. Cl. 525; *In re Application of Wintrol* (1985), 38 Ill. Ct. Cl. 409.) In *Martinez*, the victim was killed in an area where he went to buy heroin. (*Martinez*, 35 Ill. Ct. Cl. at 526.) In *Wintrol*, the victim went to an apartment building to buy narcotics for an acquaintance, was sexually assaulted, and fell from a second-story window attempting to escape from her attackers. *Wintrol*, 38 Ill. Ct. Cl. at 410.

The only apparent differences between these cases and the instant case appear to be that a companion, not the victim, was purchasing narcotics and that the victim may have assisted authorities in investigating drug dealers. However, there was no evidence presented that the victim was unaware that she was going to an area where drug trafficking was prevalent for the purpose of purchasing narcotics. In addition, there was no evidence presented that this trip by the victim was in any way related to any assistance she was providing law enforcement authorities. The Act was meant to lessen the hardship on the innocent victims of crime and their families. The victim here was not a totally innocent victim but was present at an unlawful drug transaction. Therefore, due to the fact that the victim's actions contributed to her death, it is the opinion of the Court that the claim be denied.

The Claimant did submit an affidavit by one David M. Kahn indicating he had knowledge that the decedent

cooperated with law enforcement officials. There is nothing in the affidavit to indicate that Mr. Kahn is with a police agency. In fairness, we will grant Claimant 60 days to file with the Court an affidavit, signed by a law enforcement official on official letterhead, indicating that the decedent was assisting police at the time of her death. In the event such an affidavit is filed, the Court will reconsider the claim's denial. In the event such affidavit is not filed, then and in that event, this claim is dismissed with prejudice on the sixty-first day following the entry of this opinion without further order.

(No. 95-CV-1334—Claim denied.)

In re APPLICATION OF MARIE MOORE

Order filed January 27, 1995.
Opinion filed December 4, 1995.
Order filed February 22, 1996.

MARIE MOORE, *pro se*, for Claimant.

JIM RYAN, Attorney General (PAUL H. CHO and DONALD MCLAUGHLIN, Assistant Attorneys General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Under section 10.1(d) of the Crime Victims Compensation Act, an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to his injury or death.

SAME—*homicide victim's illegal conduct contributed to his death—claim denied.* The decedent's involvement in illegal gambling activities just prior to being shot and killed by the person with whom he was gambling, along with his illegal possession of marijuana, contributed to his death to such an extent as to warrant the denial of his mother's request for compensation.

ORDER

PER CURIAM.

This claim arises out of an incident that occurred on October 10, 1994. Marie Moore, mother of the deceased victim, Louis Jackson, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. 740 ILCS 45/1, *et seq*.

This Court has carefully considered the application for benefits submitted on November 9, 1994, on the form prescribed by the Attorney General and an investigatory report of the Attorney General of Illinois which substantiates matters set forth in the application. Based upon these documents and other evidence submitted to the Court, the Court finds:

1. That on October 10, 1994, the victim was shot, allegedly by an offender who was known to him. The incident occurred near 6419 South Hamilton, Chicago, Illinois. Police investigation revealed that prior to the incident, the victim and the alleged offender were involved in a dice game and were gambling for money. After the dice game concluded, the alleged offender initiated a verbal dispute with the victim over the money he had lost. During this dispute, the alleged offender produced a handgun and shot the victim. The alleged offender has been apprehended and charged with first degree murder. The criminal proceedings against him are currently pending.

While removing the body of the victim from the scene, the investigating police officers discovered a large plastic bag containing several smaller plastic bags in which a crushed green plant substance was observed. An investigation by the Chicago Police Crime Lab determined that this substance was marijuana.

2. That section 10.1 of the Act indicates factors used to determine entitlement to compensation. Specifically, section 10.1(d) of the Act states that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to the injury or death of the victim.

3. That it appears from the investigatory report and the police report that prior to the incident, the victim and the alleged offender were gambling. As a result of these actions, the alleged offender shot the victim during a dispute concerning the money he lost. Further, the victim was in possession of an illegal narcotic at the time of the incident.

4. That the victim's conduct contributed to his death to such an extent as to warrant that the Claimant be denied entitlement to compensation.

5. That this claim does not meet a required condition precedent for compensation under the Act.

It is hereby ordered that this claim be and is hereby denied.

OPINION

JANN, J.

Marie Moore, mother of deceased victim, Louis Jackson, seeks compensation pursuant to the provisions of the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1, *et seq*.

Claimant's application was denied by order of the Court on January 27, 1995. Louis Jackson had been engaging in illegal gambling just prior to his death. Jackson was shot and killed by the person with whom he was gambling. The investigating police officers discovered a large

plastic bag containing several smaller plastic bags in which a crushed green plant substance was observed. Testing at the Chicago Police Crime lab determined that the substance in the decedent's possession was marijuana.

Claimant Moore requested a hearing which was held on July 10, 1995, before Commissioner Whipple. Claimant presented no witnesses to the incidents leading to her son's death. She testified that her son's friend had picked him up to go "partying" at 7 p.m. in a black car. The friend was not identified by name.

Understandably, Claimant was devastated by the death of her 16-year-old son. Claimant testified to her love and affection for her son and was proud that he had enrolled in college. Unfortunately, Claimant was unable to provide any evidence which would justify an award in this case. The police investigation clearly indicates that Louis Jackson was involved in illegal conduct which contributed to his death to such an extent as to warrant that Claimant be denied compensation.

It is hereby ordered that this claim is denied.

ORDER

JANN, J.

This cause comes on to be heard on the applicant's request for reconsideration, due notice having been given, and the Court being advised.

It is hereby ordered that the applicant's request is denied and this matter is closed.

ORDER

JANN, J.

This cause was presented for rehearing before Commissioner Whipple on December 9, 1996. Claimant's

petition for compensation pursuant to the Crime Victims Compensation Act (740 ILCS 45/1 *et seq.*), was denied by order of the Court on December 4, 1995. Claimant was advised that in order to prevail at rehearing, the assertions and conclusions raised in her petition must be supported by evidence, relevant testimony and/or documentation. (See order of 8/1/96.)

The rehearing transcript and commissioner's recommendation submitted herein clearly demonstrate that Claimant has failed to meet her burden of proof. Claimant presented absolutely no evidence to support her claim.

We must therefore deny this claim with prejudice and order this cause closed by the clerk of the Court.

(No. 96-CV-1025—Claimant awarded $1,500.)

In re APPLICATION OF PRISCILLA NELSON

Order filed January 17, 1997.

PRISCILLA NELSON, *pro se*, for Claimant.

JIM RYAN, Attorney General (DONALD MCLAUGHLIN, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*reduction or denial of award—victim's contributory acts or prior criminal conduct.* Under section 10.1(d) of the Crime Victims Compensation Act, an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior criminal conviction or conduct of the victim may have directly or indirectly contributed to his injury or death.

SAME—*prior altercation between victim and assailant—mother's award for funeral expenses reduced by 50% due to son's contributory acts.* In a mother's claim for funeral and burial expenses arising out of her son's homicidal death, where testimony indicated that a day or two before the victim was

shot, he swung a baseball bat at his assailant during an argument but did not strike or injure him, the Claimant was entitled to $3000 for funeral expenses, but her award was reduced by 50% to $1,500 due to her son's actions which indirectly contributed to his death.

ORDER

MITCHELL, J.

This claim is before the Court on an application for compensation filed by the Claimant, Priscilla Nelson, under the provisions of the Crime Victims Compensation Act, hereafter referred to as the Act. (740 ILCS 45/1, *et seq*.) The Claimant filed an application alleging she was entitled to compensation for funeral and burial expenses resulting from the homicidal death of her son, Ricky Nelson, on September 4, 1995.

An order was entered by this Court on January 11, 1996, denying the claim due to the victim's conduct contributing to his death to such an extent as to warrant the Claimant be denied entitlement to compensation pursuant to section 10.1(d) of the Act. The Court found the victim contributed to his death by becoming involved in an altercation with his assailant, in which he swung a bat at his assailant. The Claimant made a timely request for a hearing pursuant to Section 13.1 of the Act. A hearing was held on April 30, 1996. The evidence consisted of the testimony of the Claimant and Vanessa McDonald, the victim's sister; a letter from L. King Funeral Chapel in East St. Louis, Illinois; and a bill for funeral expenses totaling $3,174.72.

According to the testimony, the altercation involving the baseball bat occurred a couple of days or the day before the victim was shot to death. The witnesses stated that, at a coroner's inquest into the death of the victim, law enforcement officials did not mention an altercation

involving a baseball bat. The letter from the funeral home stated that according to the victim's death certificate, the cause of death was homicide. The Attorney General's office produced no evidence to rebut this testimony and evidence nor to impeach the witnesses.

Section 10.1 of the Act provides that an award shall be reduced or denied according to the extent to which the victim's acts or conduct provoked or contributed to his injury or death, or to the extent to which any prior conduct of the victim may have directly or indirectly contributed to the injury or death of the victim. This Court has denied an award where, a short time before the victim was shot and killed, the victim and another person had attacked and severely beaten the offender. (*In re Application of Anaya* (1981), 35 Ill. Ct. Cl. 540.) In another case, this Court reduced an award by 25% where the victim was shot as the result of a dispute between the victim and the offender's brother, whom the victim believed stole his brother's car radio the night prior to the incident. (*In re Application of Hodge* (1983), 35 Ill. Ct. Cl. 1016.) That dispute resulted in a fight between the victim and the offender's brother. During the course of this fight, the offender came out of an apartment and shot the victim. *Id*. at 1017.

The instant case appears to be more similar to *Hodge* than *Anaya*. Here, the original confrontation between the victim and the offender apparently did not result in physical harm being done to the offender, as had occurred in *Anaya*. Furthermore, according to unrebutted testimony, the original confrontation occurred at least one day before the shooting in which the victim was killed. Therefore, due to the fact that the victim's actions indirectly contributed to his death and because there was a lapse of time between the original confrontation and

the shooting, the Claimant, whose funeral expenses claimed exceeded the $3,000 statutory limit, is awarded the $3,000 limit for funeral expenses reduced by 50% due to the victim's contributing acts, for a total award of $1,500.

(No. 96-CV-1195—Claim dismissed.)

In re PETITION OF MARIA LUKAS

Order filed June 17, 1997.

MARIA LUKAS, *pro se*, for Claimant.

JIM RYAN, Attorney General (DONALD MCLAUGHLIN, Assistant Attorney General, of counsel), for Respondent.

CRIME VICTIMS COMPENSATION ACT—*limitations period for filing claim—legal disability.* Under the Crime Victims Compensation Act, persons have one year after the incident of violent crime to file a claim, but this period may be extended an additional year by the Court, and for purposes of extending the time for filing, a person must be legally disabled in that he or she must be an infant or suffering from mental incapacity or incompetency.

SAME—*victim rendered comatose after crime was not incompetent—claim dismissed as untimely.* A man who was rendered comatose for several weeks from injuries sustained in a fight at a supermarket was not legally disabled such that he could not file a timely claim under the Crime Victims Compensation Act, and his wife's request for an extension of time to file a claim was dismissed, since the record showed that the victim, after coming out of the coma, was alert, walking, and discussed the possibility of filing a crime victim's claim with an attorney, and although the man may have been impaired, he was not incompetent during the period when he could have filed for benefits.

ORDER

SOMMER, C.J.

This claim was heard on the Claimant's petition for extension of time to file a claim under the Crime Victims Compensation Act, hereinafter referred to as the Act. 740 ILCS 45/1 *et seq*.

The victim, the Claimant's husband, was injured in a fight in a supermarket on May 2, 1987, and the Claimant's petition was filed on October 16, 1995. The petition recited that the victim was comatose after the incident and died on December 12, 1994. The Court referred the Claimant's petition to a Commissioner for hearing to determine whether the victim was "legally disabled as a result of the occurrence," such that he could not file an application under the Act. 740 ILCS 45/6.1(a).

At the hearing, the Claimant testified that the victim was seriously injured in the incident and spent 18 days in intensive care during which time he was in a coma. The victim did come out of the coma and on May 30, 1987, was transferred to the Rehabilitation Institute of Chicago where he received treatment for six months. Additionally, in 1987 or 1988, the victim sought counsel as to whether to file under the Act and was advised not to do so by his attorney. The victim died of a heart attack in 1994.

The victim was declared disabled by the Social Security Administration as a result of his injuries incurred on May 2, 1987. The Claimant argues that the victim, therefore, was "legally disabled" for purposes of extending the statute of limitations for filing of claims under the Act. Persons have one year after the incident of violent crime to file under the Act. This one year period may be extended by an additional year by the Court. 740 ILCS 45/6.1(a).

For purposes of extending the time for filing, a person must be "legally disabled," that is, the person must be an infant or suffering from mental incapacity or incompetency. *In re Application of Curry* (1994), 47 Ill. Ct. Cl. 550, 553.

The victim may have been impaired, but it does not appear that he was incompetent. In the discharge summary

from the hospital from which the victim was discharged in late May of 1987, the victim was described as alert, walking about, and able to answer questions. The victim discussed filing under the Act with an attorney. This presumes that the victim could understand the availability of the Act and the requirement for filing thereunder. We find that the victim was not incompetent during the period when he could have filed for benefits under the Act.

The Claimant also is alleging that the victim died as a result of the 1987 incident, which occurred six to seven years previously. The victim died in 1994 of a heart attack. There is absolutely no evidence that the 1987 incident caused the victim's death other than the Claimant's belief.

It is therefore ordered that the Claimant's petition for extension of time to file a claim under the Crime Victims Compensation Act is denied, and this Claim is dismissed.